Supreme Court, U.S.
FILED

97-1425 FEB 26 1998

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In The
Supreme Court of The United States
October Term 1997

KARL ROBERTS,

Petitioner,

v.

UNIDYNAMICS CORPORATION, et al.

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Eighth Circuit panel's opinion in reversing the jury verdicts for insufficiency of evidence did so far and egregiously depart from the accepted and usual course of appellate review as to require this Court to exercise its supervisory power?

(2) Whether a perceived disability claim under the Americans With Disabilities Act will require Plaintiffs to produce direct evidence of the Defendant's perception?

(3) Whether a perceived disability claim under the Americans With Disabilities Act requires a record of actual impairment before liability may be imposed for being regarded as having an impairment?

(4) Whether Petitioner's Graves Disease, mistakenly believed to be HIV or AIDS, qualifies as a perceived disability under the Americans With Disabilities Act?

(5) Whether statistical evidence offered to demonstrate pretext must be exact in nature and character of the offense to allow similarly situated comparisons?

(6) Whether direct evidence of perceived disability by a chief shop steward who participated in the grievance process is sufficient to impose liability against a Union under the Americans With Disabilities Act?

LIST OF PARTIES TO THE PROCEEDINGS

1. Karl Roberts, Petitioner is an individual and a resident of the State of Illinois.

2. Respondent Unidynamics is a Missouri corporation.

3. Respondent District Number 9, International Association of Machinists and Aerospace Workers is the regional union for the State of Missouri.

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PETITION FOR WRIT OF CERTIORARI

Karl Roberts respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on October 6, 1997, rehearing denied November 28, 1997, in order to reinstate Petitioner's jury verdict and resolve the important issues presented herein.

OPINIONS BELOW

On September 19, 1995, following six days of trial, a jury found that Respondents had discriminated against Petitioner in his employment based on a perceived disability in violation of the Americans With Disabilities Act ("ADA") and the Missouri Human Rights Act ("MHRA"). The jury awarded Petitioner $535,000.00 in damages and apportioned fault 70% against Respondent Crane and 30% against Respondent Union.

The district court considered post-trial motions of all parties and issued its final order and memorandum on February 26, 1996. There the court determined that $35,460.00 of the judgement represented back pay and $499,540.00 represented compensatory damages. It thereby reduced the compensatory damages to $300,000.00 pursuant to its interpretation of the applicable statutory limitations. 42 U.S.C. 1981a. The opinion and judgment is reprinted in Appendix A hereto ("App. B") at page B-1.

Respondents appealed the jury verdict on several grounds and Petitioner cross-appealed. A three-judge panel of the Eighth Circuit Court of Appeals reversed the jury verdict based on insufficiency of the evidence. The opinion is reprinted in Appendix A hereto ("App. A") at page A-1. By

order filed November 28, 1997, the court denied Petitioner's Suggestions and Petition for Rehearing En Banc, The order is reprinted in Appendix A hereto (App. A- 18).

JURISDICTION

Pursuant to Supreme Court Rule 13, this petition has been filed within 90 days of the denial of rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTES INVOLVED IN THIS CASE

Section 12112(a) of the ADA provides:

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedure, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

The term "disability" means, with respect to an individual:

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such impairment; or

(C) being regarded as having such an impairment, 42 U.S.C. sec. 12102(2).

The term "regarding as having [a disability]" includes persons who have "a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment." 29 C.F.R. Sec. 1630.2(a)(2).

STATEMENT OF THE CASE

The District Court entered judgment based on a jury verdict finding that Respondents wrongfully discharged Petitioner in violation of the Americans With Disabilities Act. Petitioner's claim was premised upon a perceived disability of Graves Disease and/or Human Immune deficiency Virus (HIV) or Acquired Immune Deficiency Syndrome (AIDS). Jurisdiction of District Court was conferred upon by 28 U.S.C.sections 1331 and 1343.

During the trial it was shown that Petitioner suffered a dramatic and unintentional weight loss (60 pounds) in the spring of 1992. He experienced shakes and tremors and required constant use of the restroom. In the months following, Petitioner's co-workers rumored that Petitioner had the AIDS virus and described him as dying.

In June, 1992 Petitioner could no longer perform the functions of his work in the paint department because of erratic heartbeats from the Graves Disease. While in that department, an assistant supervisor warned a co-worker of Petitioner not to use Petitioner's equipment because he may have AIDS.

When Petitioner returned to the weld department, his supervisor there told him he was a liability to the company and to find another job.

At the end of September and the first week of October, 1992, Petitioner was subjected to two fabricated and unprecedented incidents for which he was discharged. He was accused of insubordination. Statistically, the discharge was also unprecedented and violated the employer's progressive disciplinary policy.

The Eighth Circuit reversed holding the evidence was insufficient to prove the Respondents regarded Petitioner as disabled. In doing so, the appellate court adopted completely the Respondents' version of the evidence, resolved conflicts in the evidence for the Respondents and plainly misstated that liability was imposed on HIV or AIDS alone. The bias of the opinion has violated Petitioner's Seventh Amendment right to jury trial and egregiously departs from the usual standards and limitations of appellate review.

REASONS FOR GRANTING THE WRIT

I. The Eighth Circuit Opinion so far departs from the accepted and usual course of judicial proceedings requiring this Court to exercise its supervisory power.

A. Proper Standard of Review.

The decision of the panel is in direct conflict with the Seventh Amendment right to a jury trial and this Court's precedent which requires that " . . . credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255 (1986). See also Childress, Steven A. And Davis, Martha S., Federal Standards of Review, 2d. Ed., Vol.1 at 3-14 (1995). (During the reviewing process, a court may not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment for that of a jury.) In this case, the court's opinion not only misstates the issue for liability before the jury, but provides absolutely no deference to the jury verdict and Petitioner's evidence.

Moreover this Court has repeatedly stated that Petitioners need not provide direct evidence of ultimate issues but may rely on any form of evidence from which a jury may infer the ultimate issue, giving the evidence whatever weight and credence it deserves. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711(1983). The opinion below completely disavows these standards of law and evidences a bias against this Petitioner. So much so that had the actual trial evidence been that as recited in the opinion there would not have been a trial at all. What necessarily follows, therefore, is the evidence Petitioner did produce.

B. The Evidence.

Respondent Crane is a manufacturer of food vending machines, elevators and contract manufacturer for the postal service (App. D, 112). Petitioner Karl Roberts was hired by Crane on January 9, 1989 as a welder at its plant in St. Louis, Missouri (App. D, 46,45). Respondent Union was the exclusive bargaining representative of Petitioner throughout his employment at Crane. Petitioner was discharged on October 8, 1992 (App. C, 41).

In the spring of 1992, Petitioner began to experience various physical ailments including rapid weight loss (45 to 60 pounds within two months), burning eyes, tremors, itching and severe diarrhea (App. D, 46-48). The diarrhea caused Petitioner to use the restroom between 20 and 30 times per day (App. D, 46). In June, 1992, Petitioner was diagnosed with Graves Disease (App. D, 48).

Petitioner's physician testified that while the cause of the Graves Disease is unknown, typical symptoms of the disease include weight loss, tremor, fast heart rate or

palpitations, diarrhea, itching and bulging eyes (App. D, 35). If left untreated, Graves' Disease can lead to permanent blindness and even death (App. D, 86).

Petitioner presented several co-workers who testified as to Petitioner's grim appearance and rapid decline in the months leading up to his termination. These co-workers uniformly testified that: Petitioner had lost a great deal of weight in a short time; that he became extremely skinny, like someone with anorexia; that he looked pale, real sick; his face was drawn in and his eyes bugged out; that Petitioner looked like Rock Hudson just before his death and they though Petitioner was going to die (App. D, 71, 74, 76, 77, 89, 91).

Respondents' witness, chief shop steward L.C. Monehan, testified at trial that Petitioner did not appear ill during the time in question, but was impeached by his own deposition testimony where he stated that Petitioner looked really ill, like he had the HIV virus . . . real skinny and dried up like you see on T.V. (App. D, 91). Mr. Monehan was present to hear the jokes and rumors that Petitioner may have the AIDS virus (App. D, 74, 75).

Mr. Dennis Blake supervised the entire weld department including Petitioner (App. D, 47, 48). Petitioner testified that Mr. Blake questioned him regarding his frequent use of the restroom (App. D, 68). Mr. Blake admitted he saw Petitioner on a daily basis (App. D, 98), but categorically denied noticing any change in Petitioner's appearance or behavior other than believing that Petitioner might have had pink eye (App. D, 99). Petitioner had informed Mr. Blake that he had been diagnosed with Graves Disease and had bad blood (App. D, 68). Mr. Blake seemed startled by this

information (App. D, 48). Blake never knew what Graves Disease was (App. D, 98).

In June, 1992, Petitioner transferred to the paint department where he remained for approximately two to three weeks before transferring back to the weld department (App. D, 48, 49). Petitioner testified that his Graves Disease caused erratic heart beats while wearing the suit required in the paint department (App. D, 48, 67). Although Petitioner had worked in the paint department on previous occasions, the Graves Disease caused him to become exhausted when wearing the paint suit and unable to perform the job (App. D, 48, 67).

While working in the paint department, Petitioner's supervisor was George Herman (App. D, 87). Mr. Mike Branscum was a paint department employee which occupied a position known as group leader (App. D, 87). Mr. Branscum's responsibilities included assisting Mr. Herman by relaying orders to the painters, warning Mr. Herman of dangers within the paint department and informing him of any employees who may be ill (App. D, 87). Mr. Branscum warned at least one of Petitioner's co-workers, Mr. Kelley, not to use any of Petitioner's equipment because Petitioner might have AIDS (App. D, 89). Mr. Kelley took the statement by Mr. Branscum quite seriously and did not use any of Petitioner's equipment (App. D, 90).

In July or August, 1992, after Petitioner returned to the weld department, supervisor Blake approached Petitioner and informed him that he was a "liability to the company and that he should find another job" (App. D, 50).

On September 30, 1992, while Petitioner and the entire weld department was on break, Petitioner grabbed a

piece of scratch paper from Mr. Blake's desk and wrote a personal note to a co-worker (App. D, 51). Mr. Blake approached Petitioner and asked to see the note (App. D, 51,52). Petitioner explained that the note was personal, written on his break-time and he did not believe he had to show it to Mr. Blake (App. D, 51-53).

Petitioner returned to work and was again approached by Mr. Blake regarding the note (App. D, 51-53). Petitioner repeated that it was personal and written on his break-time (App. D, 52-53). When Mr. Blake continued to insist that Petitioner turn over the note, Petitioner requested that the shop steward, L.C. Monehan, be summoned (App. D, 52, 53). When Mr. Monehan arrived, he told Petitioner to show Blake the note (App. D, 52, 53). The note said, "Charlie, this is Catfish, are you mad at me?" (App. D, 53). "Charlie" referred to a co-worker, Charlie Goodson, and "Catfish" referred to the Petitioner (App. D, 53).

At trial, Mr. Blake conceded that he had no authority to seize or demand to see a note written by an employee on break-time (App. D, 111). Shop steward Monehan also admitted that he did not know of any plant rule which gave Mr. Blake authority to demand the note. In his 32 years at Crane, Mr. Monehan had never heard of a member of management demanding to see a note written while an employee was on break (App. D, 91). Similarly, co-worker Gary Inness who had been employed by Crane for 25 years could not think of even one similar instance (App. D, 71, 72). The incident was unprecedented.

Moreover, Mr. Blake did not cite Petitioner for any wrongdoing after Petitioner revealed the note. Mr. Blake did,

however, prepare a disparaging memo to Petitioner's personnel file recounting the events without informing Petitioner or the shop steward that he had done so (App. D, 110, 111). Consequently, Petitioner had no knowledge of the memo and was, in effect, barred from filing a grievance over the incident (App. D, 110).

Just five days later, on October 5, 1992, Petitioner was working at a station on the big-cabinet assembly line (App. D, 54). Since Petitioner usually worked on the small-cabinet line, he was not at his regular work station. Mr. Blake approached Petitioner and asked him if a spool lying on the floor was his and Petitioner replied that it was not (App. D, 54). Mr. Blake asked Petitioner if he knew whose spool it was and Petitioner replied that he did not. Blake then asked Petitioner if he threw it there and Petitioner again replied that he had not (App. D, 54). Blake then told Petitioner to pick it up anyway and Petitioner acknowledged Mr. Blake's request (App. D, 54). Co-worker, James Woolsey, corroborated Petitioner's testimony regarding Mr. Blake's questioning of Petitioner (App. D, 77, 78). A welding spool is made of cardboard and approximately 12 inches long and 4 inches wide.

After completing his job for the day, Petitioner forgot to look for the spool Mr. Blake had referred to (App. D, 69). The following day, October 6, 1992, Petitioner worked his regular 8-hour shift on the small cabinet line (App. D, 55). Prior to the end of the shift, Mr. Blake asked Petitioner to work overtime on the big-cabinet line (App. D, 55). When Petitioner began working on the big-cabinet line, production was behind (App. D, 55, 56). Petitioner was working to catch

up the production line with his welding helmet down when Mr. Blake approached Petitioner and said, "I thought I told you to pick up the spool" (App. D, 56, 57). Petitioner thought Blake was referring to that same day, October 6, 1992, and replied "You did not tell me to pick up a spool" (App. D, 56). Mr. Blake then ordered Petitioner to pick up a spool and Petitioner said, "Okay" (App. D, 57).

Petitioner continued to weld until he was caught up on production (App. D, 58). Before Petitioner stopped welding, his helper, Mr. Woolsey, scanned the areas for a spool and was unable to locate one (App. D, 79, 80). After approximately ten minutes, Petitioner was caught up on production, stopped welding and looked for, but could not find the spool Mr. Blake had referred to (App. D, 58).

Eventually, Mr. Woolsey did locate a spool, hidden under a parts rack (App. D, 79, 80). Before anyone picked up the spool, Mr. Blake, plant manager Ron Wilson and chief shop steward L.C. Monehan arrived at Petitioner's work station (App. D, 58, 59, 80, 81). When confronted by Mr. Wilson, Petitioner tried to explain that Blake had a standing order that production was always the first priority-not picking up trash- and that he did not understand Blake's order meant stop production immediately. (App. D, 59). Petitioner then attempted to explain that they had been unable to find a spool but was denied the opportunity to explain (App. D, 59, 80, 81). In frustration, Petitioner asked Mr. Wilson, "Ron, what am I supposed to do, show the guy the color underwear I got on if he asks?" (App. D, 59).

Petitioner was then informed that he was being suspended pending investigation for insubordination and

escorted from the plant (App. D, 59, 60). However, despite Respondents' testimony that the decision to tire Petitioner was not made until October 8, 1992 (App. C, 41), a memo dated October 6, 1992 depicting Mr. Blake's version of the events that day is captioned "termination" (App. C, 42). (Blake had therefore known two days before the decision was purportedly made by human resources.)

Co-worker Marvin Mullen, who had worked at Crane for 31 years, testified at trial that the spool Mr. Woolsey eventually found had been in that same spot for at least two weeks and many employees had worked at that station during that time (App. D, 83, 84). He believed that the entire incident must have been a set-up (App. D, 84). Petitioner also put on testimony by long-time employees of Crane that production was always the number one priority; that employees were given 5 minutes at the end of their shift to clean up their work stations, and none of them had ever had a member of management demand they stop production to pick up trash (App. D, 71-73, 77, 78, 84). Furthermore, if employees did not make a minimum rate of production, they would be written up (App. D, 81).

Petitioner testified that, in hindsight, it was odd that his supervisor asked him to work overtime on October 6, 1992 at the same station be was the day before since the individual working at that station was also working overtime but was moved to another station (App. D, 70). Common practice by Crane would have had Petitioner working overtime at the station where the other employee was transferred to (App. D, 70).

Mr. Blake admitted at trial that Petitioner had not

been insubordinate on October 5, 1992 by merely forgetting to look for and pick up an empty spool (App. D, 100-103). Moreover, Petitioner presented uncontradicted statistical evidence at trial that showed, even if he had been insubordinate on October 6, 1992, company policy would have dictated a verbal or written reprimand at worst (App. D, 100-109, 112-127).

In the five years preceding Petitioner's discharge, 27 employees had been discharged--only one for insubordination (App. D, 100-103). That one employee, Clarence Bowens, was cited ten times for misconduct, six of those citations were for insubordination (App. D, 103-109). Incidents of his misconduct include, but are not limited to; (1) April, 1988: abusive language; (2) August, 1988: threatened supervisor; (3) May, 1990: walked off job and threatened supervisor; (4) November, 1990; told supervisor to get out of my mother fucking face and fuck a reprimand and other vulgar language (App. D, 103-109).

During the same five year period, 24 employees were cited for insubordination but only Mr. Bowens and Petitioner were discharged (App. D, 103, 112-127).

In all, 16 employees were cited for two or more incidents of insubordination and none were discharged. Seven other employees were cited for insubordination one time and received only verbal or written reprimands (App. D, 112-127). Chief shop steward Monehan conceded that, in his 32 years with the company, he had never seen an employee discharged for one act of insubordination (App. D, 93).

Director of human resources, Edwin Barutio, and chief shop steward Monehan waived Petitioner's first and

second step grievances and referred the grievance directly to the third stage which involved a grievance hearing (App. D, 112, 113). Despite Petitioner's attempts to contact union officials, no one from Crane or the union notified Petitioner of this action (App. D, 60-62). Petitioner only learned of the grievance hearing the night before it was scheduled when a co-worker called him at home (App. D, 62).

Upon his arrival for the hearing, Petitioner requested Mr. Woolsey be brought in to the hearing as a witness (a 2-3 minute walk from the plant floor) (App. D, 63, 64) and Mr. Soutier replied, we'll take care of that when we get in there During the hearing, Petitioner again told the union and management representatives that Mr. Woolsey was a witness to the spool incidents (App. D, 63, 64). However, at no time did anyone from management or the union attempt to call Mr. Woolsey to the hearing or even contact him as part of their investigation (App. D, 81, 82).

During a break in the hearing, management officials left the room and union representative Soutier scolded the Petitioner saying, "What the fuck are you trying to do? Just come up with this bullshit story. . . tell them you're sorry for what you did, it was your fault, and please give me my job back" (App. D, 64). When the hearing reconvened, Petitioner apologized and asked for his job back (App. D, 64, *65).* Crane thereafter denied the grievance.

Union business representative Soutier testified that Petitioner never requested witnesses at the hearing and made no mention of witness names during the hearing (App. D, 96) even though it would be nearly impossible to explain the events without mentioning Mr. Woolsey. Shop steward

Monehan also said that he did not hear Petitioner request witnesses (App. D, 92) but was again impeached by his deposition testimony where he stated that Petitioner did request witnesses (App. D, 92). Both Mr. Monehan and Mr. Soutier admitted at trial that they did not investigate Petitioner's grievance or speak with any potential witnesses (App. D, 92, 93, 97).

Petitioner's co-worker Charlie Goodson also testified that chief shop steward Monehan threatened him shortly before trial, indicating that Respondents had prepared suits against co-workers who planned to testify for Petitioner at trial (App. D, 129, 130).

The verdict-director forms submitted to the jury demonstrates that the jury was to consider Petitioner's Graves Disease, as well as HIV and/or AIDS, in determining whether Petitioner was perceived by Respondents as being disabled (App. C, 44, 45).

C. Appellate Opinions Erroneous Conclusions of Fact and Law

1. Evidence of Knowledge of Petitioner's Condition

On page 3 and 9 of the Appellate Court's opinion, it refers to only AIDS and/or HIV (not Graves Disease) and states the evidence was "insufficient to support the jury's conclusion that Crane regarded Plaintiff as having HIV or AIDS." It is undisputed, however, that Petitioner's supervisor, Mr. Blake, knew Petitioner had Graves Disease, even though Blake did not know what that disease was. The verdict-director allowed this jury to find for Petitioner if Respondents regarded the Graves Disease, in addition to HIV or AIDS, as a perceived disability. The Court's exclusive

reliance on HIV or AIDS as the perceived disability plainly ignores this critical fact and how the jury was instructed.

This is the first of many absolute misapprehensions of Petitioner's case made by the court below. As recited above, the jury was instructed to determine whether Respondents regarded him as disabled based on his Graves Disease, HIV and/or AIDS.

Even if the jury was not convinced that Respondents regarded Petitioner as having HIV or AIDS, they were instructed that they could nonetheless find Respondents regarded Petitioner as being disabled based on his Graves Disease.

Petitioner put forth extensive evidence that regardless of the cause, it was apparent to anyone who came in contact with Petitioner that he was very sick and could be dying. Although he could perform the functions of his job, his very presence was a "liability" to the company.

This is precisely the type of discrimination that the ADA was meant to prohibit. The legislative history of the ADA indicates that Congress included the "regarded as" cause of action to protect an individual who is discriminated against because of the negative attitudes toward that person's impairment. HR. Rep 101-485(II). It also protects employees who are discriminated against because of "concerns regarding productivity, safety, insurance, liability, attendance, cost . . and acceptance by workers" Comment, 29 C.F.R. sec 1630.2(1).

Whether or not Respondents believed Petitioner had HIV and/or AIDS, the jury could reasonably infer from the evidence that Respondents felt compelled to terminate him

based on his symptoms from Graves Disease. The evidence that some individuals heard that Petitioner had HIV and/or AIDS or believed that Petitioner had HIV and/or AIDS merely serves to supplement the testimony which clearly shows that Respondents had to know Petitioner's condition was severe; and that it is more likely than not that they did, indeed, regard Petitioner as disabled.

In the first paragraph on page 4 of the Appellate Court's opinion, it states that "Dennis Blake [Petitioner's supervisor], believed that [Petitioner] might have an eye infection and advised him to see a physician." The actual knowledge or belief of Plaintiff's illness by his supervisor was repeatedly contested at trial by witnesses who testified as to the extremely afflicted appearance of Plaintiff during the time in question. Plaintiff had lost a great deal of weight (45-60 pounds) in a very short time. Plaintiff's co-workers thought he was going to die; they likened him to Rock Hudson just before his death; he looked pale, real sick; his face was drawn in and his eyes "bugged out"; and he was extremely skinny, like someone with anorexia. Even chief shop steward L.C. Monehan who testified at trial that Plaintiff did not appear ill but was impeached by his deposition testimony stated that Petitioner looked ill, like he had the HIV virus . . . real skinny.

Despite daily contact with Plaintiff for four years (App. D, 46, 47), his supervisor and defense witness, Mr. Blake, whose testimony the Appellate Court credits, did not admit to noticing any change in Petitioner's appearance other than believing he might have pink eye. Nor did Mr. Blake acknowledge giving Plaintiff a difficult time for his frequent

use of the restroom (20-30 times a day) during this time (App. D, 67). Yet, this Court's opinion accepts Mr. Blake's statement as fact, giving no deference to the jury verdict or Plaintiff's evidence.

In the first paragraph of page 4 of the Court's opinion it states that "Blake did not request documentation of [Petitioner's] diagnosis, but did ask whether it would interfere with [his] ability to perform his job." Again, this is defense testimony that the jury did not believe and misapprehends Petitioner's evidence. Petitioner testified that Mr. Blake did want to know what was wrong with Petitioner (although he did not request documentation) and sent him to a doctor (App. D, 47).

In the last paragraph of page 7 of the Appellate Court's opinion, the Court states that the Petitioner did not indicate that he had been discriminated against in a letter to a union representative. However, this is clearly an argument for the defense and in no way indicative of whether Plaintiff had actually suffered discrimination. As this Court has held, a lay person is not expected to be well versed in legal theories and nuances. Love v. Pullman Co., 404 U.S. 522, 527 (1972); Hanes v. Kerner, 404 U.S. 519, 520 (1972). Plaintiff clearly realized that the circumstances surrounding his discharge were more than unusual and he obviously felt he had been wronged.

In the middle of page 10, the Court again misapprehends Petitioner's testimony on cross-examination. Petitioner replied, "yes" to the question on cross suggesting that he "did not believe that he had suffered discrimination" at the time of his discharge. However, it is not surprising that

an individual with the nightmarishly absurd situations he had encountered that week would have any idea why he was being fired, other than what the company told him. Nor was he in a position to discover the evidence which counsel did at a later date. This Court itself has stated that lay persons, even under the best conditions, cannot be expected to know what legal theories or terms to use in a given situation. Love, Hainess, Id. Once again, the appellate Court here misapplied the standard of review to the facts and the findings of the jury.

In footnote 4 on page 9 the Court mentions Mr. Barutio's statements that he, as Human Resource Manager at Crane, heard rumors of employees infected with the HIV virus (App. D, 113). The Court, however, simply accepts Mr. Barutio's denial that Petitioner was one of those employees and fails to consider that the assistant supervisor of the paint department had warned at least one co-worker that Petitioner may have HIV or AIDS. A reasonable juror could easily consider Mr. Barutio's denial inconsistent with this evidence and his subsequent discriminatory treatment of Petitioner.

Also on page 9 of the opinion, the Court indicates that Petitioner relies on his appearance during the time in question almost entirely to show Respondents regarded him as being disabled, perhaps implying that Petitioner is required to provide direct evidence, such as an admission by the Respondents. This Court has repeatedly stated that plaintiffs need not provide direct evidence of ultimate issues but may rely on any form of evidence from which a jury may infer the ultimate issue, giving the evidence whatever weight and credence it deserves. U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983).

The substantial evidence of Petitioner's grim appearance during the time in question and Respondents' assertions that they were oblivious to any of his symptoms clearly constitutes a question of fact for the jury. Moreover, although Mr. Blake did not know what Graves Disease is, he admitted being aware of Plaintiffs diagnosis (App. D, 98).. The jury, in assessing the credibility of the witnesses reasonably concluded that Respondents must have been aware of Petitioner's tremendous weight loss, tremors, extensive use of the restroom, etc. caused by his Graves Disease (which can cause death if left untreated. Dr. Lynch) (App. D, 86).

Furthermore, Petitioner presented substantial additional evidence that Respondents regarded Petitioner as having HIV and/or AIDS because of his Graves Disease. Co-worker Wes Kelley testified that while Petitioner was working in the paint department, group leader and assistant supervisor Michael Branscum warned Mr. Kelley not to use Petitioner's respirator because Petitioner may have AIDS (App. D, 87-90). Mr. Branscum admitted that part of his job was to relate to management when employees were sick. (App. D, 131).

Although Mr. Branscum denied having made the statement about Petitioner having AIDS to Mr. Kelley, Mr. Kelley testified that he took the warning very seriously and made sure not to use Petitioner's respirator (App. D, 90).

Additionally, co-worker John Ray heard co-worker Patrick Brown state on two separate occasions, in front of others including shop steward Monehan and supervisor Blake, that Petitioner had AIDS (App. D, 74, 75). On another occasion, co-worker Ken Garner testified that Mr. Brown approached him and stated that Petitioner might have AIDS

(App. D, 76). While it is improbable that Respondents would openly admit that they perceived Petitioner as having a disability under the ADA, given all the evidence, the jury could reasonably infer that Mr. Blake and other members of management had such a perception.

On page 9, the Appellate Court substitutes its own judgment for that of the jury by selectively relying on Defense-friendly testimony about (1) whether some of Petitioner's witnesses themselves believed Petitioner had HIV and/or AIDS, (2) that Mr. Blake did not indicate that he heard one of the statements and (3) that the co-workers knew of no evidence suggesting that Mr. Brown or Mr. Branscum had made similar comments to others.

These facts, even if believed by the jury, do little to challenge Petitioners substantial evidence that Respondents perceived him as disabled. The panel's decision directly adopts the Respondents' version of the facts which the jury chose not to believe, giving no deference to the jury verdict, and thereby violating Petitioner's Seventh Amendment rights and U.S. Supreme Court precedent.

2. Evidence Of Pretext

(a) The Break-Time Note Incident

Petitioner set forth substantial evidence at trial that the September 30th break-time note incident referred to in the Court's opinion at page 4 and 5 was a pretext to discharge Petitioner because of his perceived disability. The panel's decision plainly loses sight of this event occurring on Petitioners break time and the significance thereof.

Despite his 31 years at Crane, shop steward L.C. Monehan never saw a member of management demand notes

written on employee break-time, nor did he know of any plant rule which gave Mr. Blake the authority to demand such notes (App. D, 91). Other co-workers, including Gary Inness who had been employed by Crane for 25 years, similarly could not think of even one similar instance (App. D, 71, 72).

Just weeks earlier, Mr. Blake had approached Petitioner and told him he was "a liability to the company and to find another job" (App. D, 50). Although the Court, on page 11, cites Petitioners testimony on cross-examination that Petitioner "blew it off like a joke", it was no joke as later events began to unfold, as would be a reasonable inference by the jury. In the second sentence on page 11, the Court again adopts the Defense stance by stating that "Assuming that such a statement was made . . ." The jury obviously found the statement was made to Petitioner--by Mr. Blake--that he was a liability to the company and should find another job. The bias of the Appellate Court here is plain.

In reviewing a jury verdict, it is not for the Court to determine whether the statement was made, but to ascertain whether it supports an inference, in a light most favorable to Petitioner Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). It is true that Petitioner did not know, at the time it was made, why Mr. Blake would say such a thing. But in light of the fact that: (1) Petitioner had never previously received any reprimand or unsatisfactory review; (2) Petitioner had just returned from two weeks in the paint department because he could no longer tolerate the paint suit he was required to wear due to his physical condition , and (3) in view of the events that soon followed-the note and spool incidents--it is reasonable to infer, as the jury did here, that

Mr. Blake was referring to Petitioner's physical ailments. The Respondents themselves had no other explanation.

Moreover, at trial, Petitioners supervisor, Mr. Blake, conceded that Petitioner was not insubordinate on September 30th and he had no authority to demand a note written on an employee's break time (App. D, 111). Despite this admission, Mr. Blake wrote a note to Petitioner's personnel file detailing his account of the incident. Contrary to the collective bargaining agreement, Blake did not notify Petitioner that he was writing such a memo, thereby eliminating Petitioner's opportunity to file a grievance disputing Mr. Blake's version of the incident (App. D, 53, 110).

(b) The Missing Spool Incident and Petitioner's Discharge

The missing empty spool incident to which the Court refers on pages 5 and 6 also involved unprecedented demands by Petitioners supervisor, Mr. Blake. Again, many of the facts recited in the Court's opinion are from Defense, not Petitioner testimony. Petitioner testified that he forgot to look for the spool on October 5th (App. D, 69), believing it unnecessary to stop production to look for an empty cardboard spool (App. D, 59); and delayed looking for the spool on the 6th until he was caught up on production (App. D, 58) while beginning a second shift of over-time. At no time did Petitioner refuse to pick up a spool.

Moreover, it was not clear to Petitioner that he should have stopped production on October 6 to look for a spool immediately because Mr. Blake never said "immediately" or "right now" or anything to that effect (App. D, 58). In fact, Mr. Woolsey testified that if employees did not make a

minimum rate of production, they are "written up" (App. D, 81), leaving Petitioner in a catch-22 position.

Furthermore, co-workers Woolsey testified that he did not initially see a spool but eventually found one under an ammunitions rack on October 6th after the rack was empty (App. D, 79, 80). Co-worker Mr. Mullen, an employee of Crane for 31 years testified that the spool had been in that same spot for at least two weeks and many employees had worked at that station during that time. He believed that the entire incident must have been a "set-up" to fire Petitioner (App. D, 83-84).

Petitioner testified that, in hindsight, it was odd that his supervisor asked him to work over-time on the 6th at the same station be was the day before since the individual working at that station was working over-time himself but was moved to another station (App. D, 70). Common practice by Crane would have had Petitioner working over-time at the station where the other employee was assigned (TR 3-148).

At the top of page 11 of the Court's opinion, it states that "[Petitioner's] testimony was contradicted by testimony of his co-workers James Woolsey and Gary Inness, both of whom testified that Roberts did not even attempt to look for the spool." The co-workers' testimony does not support this statement.

Petitioner's assistant, Mr. Woolsey, testified on cross-examination that Petitioner did not help himself and Mr. Inness look for a spool "at that time". On direct examination, Mr. Woolsey testified that Petitioner did look for a spool (App. D, 79, 80).

In footnote 6 on page 11 of the Court's opinion, it

again accepts as true the Respondents' explanation of events that occurred. Petitioner presented a type-written note at trial, dated and signed by Mr. Blake on October 6, 1992 (App. C, 42). The caption on the note indicated that Petitioner was being "terminated". However, the decision to terminate Petitioner was not allegedly made by Mr. Blake, but by Mr. Barutio--on October 8th. The defense testified, and the Court accepted as true, that a secretary presumably added the word "termination" on her own even though the defense witnesses admitted that she would have no independent knowledge of the nature of the memo other than what Mr. Blake told her. She simply had no independent means of knowing whether Petitioner was being reprimanded, suspended or discharged. This evidence was truly remarkable and demonstrative of the pretextual nature of Respondents' testimony.

The Court's statement at the top of page 11 that Petitioner "offered no evidence suggesting that the spool was hidden . . ." again misapprehends the facts. As stated above, there was testimony by co-worker Woolsey that there was no spool immediately visible and when he found it, that it was not in plain view (contrary to Mr. Blake's testimony), but under an ammunition/gun rack. (App. D, 79,80).

In the second full paragraph of page 6 of the Appellate Court's opinion, it states that Mr Barutio, the Director of Human Resources at Respondent Crane, "conducted an investigation" of the missing spool incident. However, Mr. Barutio conceded at trial that this investigation entailed nothing more than speaking with other management officials (App. D, 127). Despite the peculiar nature of the incidents over the one week period leading to Petitioner's discharge, Mr. Barutio did not even attempt to speak with witnesses to

the events (App. D, 127).

A jury's reasonable inference from Petitioner's evidence is that Respondent Crane singled out Petitioner in a discriminatory fashion to make unique, even impossible, demands of him. Moreover, Petitioner's supervisor, Mr Blake, conceded at trial that Petitioner was not insubordinate on October 5th by merely forgetting to look for the spool. And, even if Petitioner were found insubordinate on October 6th, which the jury could reasonably infer he was not, Crane's "progressive disciplinary system" would have dictated Petitioner receive a verbal or written reprimand at worst.

Just recently, this Court stated that a "fact-finder's disbelief of the reasons put forward by the employer to rebut the employee's prima facie case (particularity if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice, with no additional proof, to permit the fact finder, upon rejection of the employer's proffered reasons, to infer the ultimate fact of intentional discrimination . . ." St Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). See also Tribble v. Westinghouse Electric Corp., 669 F.2d 1193 (8th Cir.), *cert. denied,* 460 U.S. 1080 (1982).

In this case, the jury, by its verdict and in-court reaction to significant segments of defense witness testimony, obviously found the Respondents' rebuttal evidence unconvincing and contrived. The jury's belief that Respondents fabricated events to discharge Petitioner is enough, by itself, to support a reasonable inference of intentional discrimination. Id. Yet the Appellate Court's decision sets forth defense witness testimony and other

defense evidence as if it were conclusive fact. This constitutes a clear misapprehension of the facts and is inconsistent with the stated standard of review which requires the Court to accept the Petitioners evidence as true and review the case in a light most favorable to the Petitioner.

(c) The Statistical Evidence Of Respondents Disciplinary Practices

The entire last paragraph of page 11 and continuing on page 12 of the Court's opinion constitutes perhaps the most comprehensive misapprehension of the facts and law. Here, Petitioner was discharged for one alleged act of insubordination. To show discriminatory animus, Petitioner presented substantial unbiased and **uncontradicted** statistical evidence of Respondent's ordinary practices related to employee discipline.

In the five years preceding Petitioners discharge, 27 employees had been discharged-only one for insubordination. That one employee, Clarence Bowens, was cited ten times for misconduct, six of those citations were for insubordination. Incidents of misconduct by Mr. Bowens included; (1) April, 1988: abusive language; (2) August, 1988: employee said he wished he had supervisor in back alley because he's not so tough; (3) October, 1988: violation of plant rule 27; (4) February, 1990: needless waste of time; (5) May, 1990: walked off job and threatened supervisor-made reference to former supervisor who met a violent death and stated the same thing could happen to his current supervisor; (6) November, 1990: employee states to supervisor, "Get out of my mother fucking face" and "fuck a reprimand" and other vulgar language (App. D, 103-109).

During the same five year period, 24 employees were cited for insubordination but only Mr. Bowens and Petitioner were discharged. The Court's assertion that other employees were not similarly situated or visibly insubordinate (App. D, 112, 127) comes directly from defense witness Barutio's bare assertions which is clearly contradicted by Respondent's own personnel files offered by Petitioner from those personnel files, Petitioner showed at trial that one employee at Crane repeatedly refused to rework a cabinet as ordered by his supervisor and received no disciplinary action. The same employee, just 4 days later, used abusive language and ordered his supervisor out of the work area. He received a written reprimand for the second incident-not a discharge. A second employee was cited for insubordination and the following day was cited for a safety violation. Again, the employee was not discharged. A third employee was cited for insubordination and given a verbal reprimand. Just 12 days later the employee was again cited for insubordination and given a written reprimand-not a discharge. A fourth employee punched his supervisor and received a 2-day disciplinary lay-off-not a discharge. A fifth employee spit on co-workers and/or their equipment and was given a verbal reprimand. Three days later the employee was cited for careless work and given a verbal reprimand. Eight days later the employee was cited for careless work and given a written reprimand. Two months later he was cited for careless work and given a two-day layoff-not discharged (App. D, 103-109).

In all, 16 employees were cited for 2 or more incidents of insubordination and none were discharged. Eight other employees were cited for insubordination at least once and

received only verbal or written reprimands not discharges (App. D, 112-127). Chief shop steward Monehan conceded, as he had to, that in his 32 years with the company, never knew of an employee who had been discharged for one act of insubordination (App. D, 93).

This Court has long recognized the strength of this type of evidence and has stated that it alone can establish discriminatory intent by showing that one termination is contrary to a stated company policy, or that the defendants pretext is implausible or arbitrary. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977); New York City Transit Authority v. Beazer, 440 U. S. 468 (1979); Furnco Const. Corp. v. Waters, 438 U.S. 567(1978).

In this case, many other employees were cited for one or more incidents of insubordination in a short period of time and given verbal reprimands, written reprimands or disciplinary lay-offs--not discharged. It is also clear that many of the other employees engaged in conduct that was much more visibly insubordinate and cavalier than Petitioner's alleged conduct. Moreover, only one other employee was discharged for insubordination after having accumulated ten incidents of misconduct. This evidence, at a minimum, shows that Respondents acted arbitrarily and inconsistent with their progressive system of discipline.

The Court, however, simply discards this persuasive evidence and declares that Petitioner's discharge was an exercise of Defendants' discretion. The statement of the Court on page 12 that Crane's discretion is beyond the Court's power to review, and implicitly the jury's, is plainly incorrect. A reasonable fact finder may reject the Respondents'

proffered reasons and explanations for its actions. Hicks v. St. Mary's Honor Center, 509 U.S. 502 (1993). This jury did so.

3. **Petitioner's Grievance Hearing**

In the last paragraph of page 6 of the Appellate Courts opinion, it states that "[Petitioner] waived the first and second grievance steps . . ." Nowhere is this found in the evidence. It was not Petitioner, but Mr. Barutio and shop steward L.C. Monehan who agreed to refer the grievance directly to the third stage (App. D, 112, 113).

The Court also states at the bottom of page 12 that "Monehan's involvement in the grievance process consisted of suggesting to [Petitioner] that he file a grievance, requesting that Barutio give [Petitioner] a disciplinary layoff in lieu of termination, and attending the hearing." This is plainly wrong. Mr. Barutio's testimony clearly indicates that Mr. Monehan played a significant role in the decision to waive Petitioner's first and second stage grievance rights. Moreover, the assertion that Mr. Monehan requested a layoff is defense testimony and again violates the standards of review set by this Court.

While the Court notes at the bottom of page 6 that Petitioner requested Woolsey appear at the hearing as a witness, it otherwise ignores Petitioners evidence. Testimony at trial showed that Union Representative Soutier repeatedly neglected to return Petitioner's calls and did not inform Petitioner of the grievance hearing (App. D, 60-62). In fact, Petitioner was never notified of his grievance hearing by a union or company official. He only learned of the hearing the night before it was scheduled when a co-worker called him at

home (App. D, 62).

Upon his arrival for the hearing, Petitioner requested Mr. Woolsey be brought in to the hearing (a 2-3 minute walk from the plant floor (App. D, 63, 64) and Soutier replied, "We'll take care of that when we get in there" (App. D, 63, 64). During the hearing, Petitioner again told the union and management representatives that Mr. Woolsey was a witness to the spool incidents (App. D, 63, 64). At no time did any one from management or the union attempt to call Mr. Woolsey or even find out if he had helpful information (App. D, 81, 82).

During the hearing, a caucus was held in which management officials left the room and Union Business Representative Soutier berated Petitioner saying "What the fuck are you trying to do? Just come up with this bullshit story. Tell them you're sorry for what you did, it was your fault, and please give me my job back" (App. D, 64). When the hearing resumed, Petitioner apologized as Mr. Soutier instructed him to do and asked for his job back (App. D, 64, 65).

Not surprisingly, Union Representative Mr. Soutier testified that Petitioner never requested witnesses at the hearing and made no mention of witness names during the hearing (App. D, 96) even though it would be nearly impossible to explain the events without mentioning Mr. Woolsey. Shop steward Mr. Monehan also said that he did not hear Petitioner request witnesses but was impeached by his deposition testimony that he did (App. D, 92). Both Mr. Monehan and Mr. Soutier admitted at trial that they did not investigate Petitioners grievance or speak with any potential

witnesses (App. D, 92, 93-97).

On page 12 the Court states Monehan had not played any role in the decision to arbitrate and any perception on his part is insufficient to support an inference of discrimination. The Court here again overlooks how the jury was instructed. The decision to arbitrate was not relevant to the jury. Specifically, the jury was instructed regarding ". . . District No. 9's representation of the Petitioner in the grievance proceedings against National Vendors" (App. C, 45). Monehan, as chief shop steward was capable and obligated to defend Petitioner as the business representative. He clearly did not fulfill this obligation.

On page 13 the Court acknowledges that Mr. Monehan described Petitioner as having HIV, but adopts the Defense position by stating his description did not mean Petitioner had proven Monehan believed Petitioner had HIV. With this reasoning, the Court is requiring direct evidence of Monehan's belief, such as an admission. However, the this Court has unequivocally stated that such factual determinations can be, and usually are, proven by circumstantial evidence. United States Postal Service Board of Governors v. Aikens, 460 U.S 711 (1983). Otherwise, plaintiffs would never prevail absent an admission by the defendant. Clearly, Mr. Monehan's description of Petitioner's appearance would lead a reasonable fact finder to conclude that Monehan perceived Petitioner as having a disability.

Co-worker Charlie Goodson also testified that shop steward Monehan threatened him shortly before trial, indicating that Respondents had prepared suits against co-workers who planned to testify for Petitioner at trial (App. D,

44, 45).

The evidence of Petitioner as the foregoing demonstrates, was wholly manipulated in the opinion of the Appellate Court which deprived Petitioner of his Seventh Amendment right. The precedent of this Court was equally disavowed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted:

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

OPINION
FILED, OCTOBER 6, 1997
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ORDER DENYING REHEARING
FILED, NOVEMBER 28, 1997
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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-2432

Karl Roberts,	*	
Plaintiff/Appellee,	*	
	*	
v.	*	
	*	
Unidynamics Corporation, a	*	
Missouri Corporation; doing	*	
business as Crane National	*	Appeals from the
Vendor,	*	United States District
Defendant,	*	Court of the Eastern
	*	District of Missouri
District No. 9 International	*	
Association of Machinists	*	
and Aerospace Workers,	*	
Defendant/Appellant.	*	

No. 96-2437

Karl Roberts,	*
Plaintiff/Appellee,	*
	*
v.	*
	*

Unidynamics Corporation, a *
Missouri Corporation; *
doing business as *
Crane National Vendor, *
Defendant/Appellant. *
*
District No. 9 International *
Association of Machinists *
and Aerospace Workers, *
Defendant/Appellee. *

No. 96-2440

Karl Roberts, *
Plaintiff/Appellant, *
*
v. *
*
Unidynamics Corporation, a *
Missouri Corporation, *
doing business as Crane *
National Vendor; District *
No. 9 International *
Association of Machinists *
and Aerospace Workers, *
Defendants/Appellees.*

No. 96-3445

Karl Roberts, *
Plaintiff/Appellee, *
*
v. *
*
Unidynamics Corporation, *
doing business as Crane *
National Vendor, *
a Missouri Corporation; *
District No. 9 International *
Association of Machinists *
and Aerospace Workers, *
Defendants/Appellants. *

Submitted: June 11, 1997
Filed: October 6, 1997

Before WOLLMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and BEEZER,[1] Circuit Judge.

WOLLMAN Circuit Judge.

Unidynamics Corporation, which does business as Crane National Vendors (Crane), and District No. 9

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[1]The HONORABLE ROBERT R. BEEZER, United States Circuit Judge for the Ninth Circuit, sitting by designation.

International Association of Machinists and Aerospace Workers (the union), appeal from the judgment entered on the jury's verdict in favor of Karl Roberts. Roberts' suit is based on his claim that Crane and the union regarded him as carrying the human immunodeficiency virus (HIV) or having Acquired Immune Deficiency Syndrome (AIDS) and discriminated against him because of that perception. Roberts cross-appeals on several issues. We reverse the judgment and dismiss the cross-appeal as moot.

I.

Roberts began working in 1989 as a welder at Crane, a company that manufactures such items as vending machines and elevators. He continued to work in the weld department until his termination in 1992, except for a brief period of time during which he worked in the paint department. In the spring of 1992, Roberts began experiencing weight loss, eye irritation, tremors, weakness, and diarrhea. Roberts' supervisor in the weld department, Dennis Blake, believed that Roberts Might have an eye infection and advised him to see a physician. Roberts followed Blake's advice and, in June of 1992, was diagnosed as having Graves' disease.[2] Roberts

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[2]Graves' disease is "a disorder of the thyroid of unknown but probably autoimmune etiology. . . ." The Sloane-Dorland Annotated Medical-Legal Dictionary, p. 182 (1992 Supplement).

reported the diagnosis to Blake. Blake did not request documentation of Roberts' diagnosis, but did ask whether it would interfere with Roberts' ability to perform his job. Roberts replied that it would not.

Roberts' physical condition was also observed by his co-workers. Several stated at trial that they had noticed a change in Roberts' appearance in that he had lost a great deal of weight, that he looked gaunt and sickly, and that his eyes "kind of bulged" or "bugged out."

On September 30, 1992, Roberts was at Blake's desk writing a note to a coworker during a break. Blake approached him and requested to see the note. Roberts told Blake the note was private and refused to give it to him. Roberts testified that Blake continued to demand to see the note and that Roberts refused to permit him to do so. Roberts stated that he walked to his work station and that Blake "was right behind [him], kind of hounding [him] about it." When Roberts arrived at his work station, Blake "gave [him] a direct order" and stated, "I want to see the note." Roberts responded, "No, it's private and I don't think I have to show it to you." After Blake gave him another direct order to hand over the note, Roberts demanded

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Roberts' treating physician testified that the classic signs of Graves' disease "are diffuse generalized enlargement Of Your thyroid or goiter along with weight loss, tremor, fast heart rate or palpations, history of diarrhea, history of itching. Sometimes the patients will have eyes that are bulging and that's a classic sip of Graves' Disease or hyperthyroidism."

that L.C. Monehan, the shop steward, be called over to resolve the dispute.

Monehan told Roberts to show Blake the note, whereupon Roberts did so. After Blake read the note, which read, "Charlie [a co-worker], this is Catfish, are you mad at me?", he said that Roberts' behavior was childish and a waste of time and informed Roberts that he was on notice and that if such behavior continued he, Blake, would take further action.

On October 5, 1992, Blake noticed an empty welding-wire spool, approximately eight to twelve inches long and four inches wide, lying on the floor near the big cabinet line where Roberts was stationed. He asked Roberts if the spool was his. Roberts replied, "I'm assuming that since I just got to this work station I know it's not mine." Blake then asked Roberts if he knew whose it was, to which Roberts replied that he did not. Blake said, "Well, pick it up." Roberts replied, "Okay," but made no attempt to look for or pick up the spool.

The following day, Roberts was stationed on the small cabinet line. At the end of Roberts' eight-hour shift, Blake asked him if he would be willing to work overtime. Roberts agreed and was moved to the big cabinet line. After Roberts had been working for about 25 Minutes, Blake approached him and said, "I thought I told you to pick up a spool." Roberts retorted, "You didn't tell me to pick up the spool." Blake said, "Pick it up, that's an order," to which Roberts replied, "I really don't appreciate the way you said that."

Blake said, "Well, pick it up." Roberts said "Okay," but resumed welding. Blake repeated his order and Roberts replied, "I heard you," but continued to weld.

Blake contacted Kay Merz, Crane's human resource manager and described Roberts' conduct. Merz agreed that Roberts' conduct was "blatant and suggested Roberts be suspended pending further investigation. Blake then contacted Ron Wilson, general production supervisor, who agreed with Merz's recommendation. Blake and Wilson notified Monehan, and the three approached Roberts. Wilson said to Roberts, "I hear that you're refusing a direct order from your supervisor by not picking up a spool." Roberts explained that he could not find the spool, and Wilson told him he was suspended pending further investigation. Roberts then said, "Ron, what am I supposed to do, show this guy the color underwear I got on if he asks me?"

Blake prepared a memorandum documenting the incident, which was submitted to Edwin Barutio, Crane's vice president of human resources. Barutio conducted an investigation of the incident and concluded that Roberts should be terminated. Barutio, testified that he came to this conclusion because Roberts had engaged in several acts of insubordination within a short period of time, the incidents were highly visible to other employees, and Roberts had demonstrated a "cavalier" attitude.

Immediately following his suspension, Monehan advised Roberts to file a grievance. Roberts waived the first and second grievance steps, and the case proceeded to a third

step grievance meeting. At the third step meeting, Barutio, Wilson, Blake, and Merz represented Crane. Business representative Bob Soutier, Monehan, and shop steward Al Bohmer represented the union. Roberts was also in attendance. Roberts testified that just prior to the meeting he informed Monehan and Soutier that James Woolsey was a witness to the spool incident and that he should be called. Woolsey was not contacted, however. During a break in the meeting, Soutier told Roberts to apologize and ask for his job back. Roberts then apologized to the Crane officials for "any inconvenience" he may have caused.

At the conclusion of the meeting, Sooner asked that Roberts be reinstated. Monehan suggested to Barutio that Roberts receive a disciplinary layoff rather than termination. Barutio denied the grievance and terminated Roberts. The union decided not to process Roberts' grievance for lack of merit. Sooner who made the decision not to pursue the grievance, explained that he believed Blake's requests of Roberts were reasonable, that Roberts' acts of insubordination had occurred over a short period of tune, and that he did not believe that Roberts had merely forgotten to pick up the spool on October 5 as Roberts testified to at trial.

On November 23, 1992, Roberts wrote to Jim Bagwell, Directing Business Representative of District 9, complaining that Sooner had failed to investigate his grievance or to make a statement on his behalf at the hearing. Roberts did not indicate that he believed that either Crane or the union had discriminated against him. On March 15,

1993, Roberts filed a complaint with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR) alleging that he had been discharged because of a "handicap/perceived handicap (Graves Disease)." The EEOC and MCHR notified Roberts of his right to sue, and Roberts filed suit against Crane and the union under the Americans with Disabilities Act (ADA), 42 U. S.C. § 12 101 et seq., and the Missouri Human Rights Act (MHRA), Mo. Rev. Stat. § 213.010 et seq., alleging that Crane had terminated him and the union had failed to investigate and pursue arbitration of his grievance because of his actual and/or perceived disabilities.[3] Following the jury's verdict in favor of Roberts, the district court denied Crane's and the union's motions for judgment as a matter of law or a new trial.

II.

We review the district court's denial of a motion for judgment as a matter of law de novo, applying the same standard as the district court. See Triton Corp. v. Hardrives, Inc., 85 F. 3d 343, 345 (8th Cir. 1996). "[W]e will not reverse a Jury's verdict for insufficient evidence unless, after viewing

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[3]The district court granted summary judgment in favor of Crane and the union on Roberts' claims of discrimination based on actual disabilities, a ruling that Roberts does not contest on appeal.

the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict for the non-moving party." Ryther v. KARE 11, 108 F.3d 832, 836 (8th Cir. 1997) (en banc), cert. denied, 117 S. Ct. 2510 (1997). Although we accord Roberts the benefit of reasonable inferences, "Inferences must be more than speculation or conjecture to be reasonable." Day v. Johnson, No. 95-4024, slip op. at 6-7 (8th Cir. Jul. 10, 1997).

In order to establish a prima facie claim of a perceived disability under the ADA, Roberts must show that each defendant ... regarded [him] as having' an impairment that 'substantially limits' a 'major life activit[y].'" Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (quoting 42 U.S.C. § 12102(2)(C)). A defendant cannot be liable for discharging an employee unless it regarded the plaintiff as having a disability. See Webb v. Mercy Hospital, 102 F.3d 958, 960 (8th Cir. 1996); Hedberg v. Indiana Bell Tel. Co., Inc., 47 F.3d 928, 932 (7th Cir. 1995). See also Gerdes v. Swift-Eckrich, Inc., No. 97-1006, slip op. (8th Cir. Sept. 11, 1997). An individual is regarded as having a substantially limiting impairment when others treat that individual as having such an impairment See Webb, 102 F.3d at 960. Similarly, under the MHRA, Roberts must establish that the defendant regarded his condition as substantially impairing his life activities. See Mo. Rev. Stat. § 213.010(10); Lorenz v. Filtronetics, Inc. (In re Estate of Latimer), 913 S.W.2d 51, 56 (Mo. Ct. App. 1995).

A. Crane

Crane argues that the evidence was insufficient to support the Jury's conclusion that Crane regarded Roberts as having HIV or AIDS. We agree. Roberts emphasizes his appearance as pivotal in Crane's perception of him, but the fact that several co-workers testified to their observations of Roberts' physical condition is insufficient to permit an inference that Roberts' supervisors regarded him as having HIV or AIDS.

Likewise, there is no substantial evidence that Roberts' co-workers regarded him as having AIDS. A paint department employee testified that a co-worker told him not to use Roberts' respirator because Roberts "might have AIDS or something." No one else was present when the comment was made. Two other employees stated that a co-worker mentioned that Roberts might have AIDS. One of the two testified that Blake, although several feet away when the comment was made, gave no indication that he had heard the alleged comment. In addition, this witness stated that the comment was made in a joking manner. All three of these co-workers testified that they did not repeat the alleged comments and knew of no evidence suggesting that the speaker had made similar comments to anyone else. Furthermore, of the nine co-workers who testified for Roberts, only one testified that he believed Roberts had HIV or AIDS.

Roberts has failed to link the alleged rumors to Crane

decisionmakers. He admitted at trial that none of the comments he believes support his disability discrimination claim were made by or to company officials. His unsupported speculation that Crane officials heard such rumors is simply insufficient to permit a reasonable jury to find for him on the issue of Crane's knowledge of those rumors. See Hedberg, 47 F.3d at 932.[4]

Roberts asserts that Blake told him in July or August of 1992 that he was a liability to the company and that he should find a new job.[5] Assuming that such a statement was made, it falls to show that Blake regarded Roberts has having HIV or AIDS. The statement itself does not evince any discriminatory animus toward Roberts. See Aucutt, 85 F.3d at 1316. Roberts admitted that he and Blake were not discussing his physical condition when Blake made the alleged statement and that Blake said or did nothing to

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[4]Roberts emphasizes that Barutio testified that he had heard rumors that three Crane employees were HIV positive or had AIDS. Barutio testified, however, that Roberts was not one of those individuals, that two of the employees had passed away, and the third remained employed at Crane at the time of trial

[5]Roberts alleges that Blake made this statement "after hearing rumors that [Roberts] had AIDS." There is no evidence, however, that Blake ever heard rumors that Roberts had AIDS.

indicate that it related to a perception that Roberts had HIV or AIDS. Roberts admitted that at the time Blake made the alleged comment he, Roberts, "blew it off like a joke." Moreover, Roberts had informed Blake that his symptoms were due to Graves'. disease, adduced no evidence showing that Blake disbelieved this explanation, and admitted that his belief that Blake's alleged statement related to HIV or AIDS was merely speculation.

Roberts submitted no other evidence sufficient to support a finding that any Crane decisionmaker believed that Roberts had HIV or AIDS. In fact, Roberts acknowledged that at the time of his discharge he did not believe that he had suffered discrimination and admitted that he subsequently learned of no evidence to support his claim that Crane perceived him as having HIV or AIDS.

Even had he succeeded in showing that Crane regarded him as disabled, Roberts' claim would fall, for he has not adduced any evidence that would permit an inference that he was terminated because of his disability. See Webb, 102 F.3d at 960; Price v. S-B Power Tool, 75 F.3d 362, 365 (8th Cir.), cert. denied, 117 S. Ct. 274 (1996); Miners v. Cargill Communications, Inc., 113 F.3d 820, 824 (8th Cir. 1997) (evidence sufficient to show employee was terminated because of disability); Lorenz 913 S.W.2d at 55. Roberts argues that the spool incident was a "set up" and that he " was suspended for failing to pick up a spool that nobody could find, not even Blake." He offered no evidence suggesting that the spool was hidden, however, other than his own claim

that although he looked for the spool on October 6 he could not find it. His testimony was contradicted by testimony of his co-workers James Woolsey and Gary Inness, both of whom testified that Roberts did not even attempt to look for the spool. Moreover, Woolsey attested that he was able to locate the spool after looking for approximately five minutes, testimony corroborated by Inness.[6]

Roberts also asserts that the discipline meted out to him was different from that imposed upon other employees and argues that the treatment he received shows that discrimination was the cause of his termination. The record does not reveal, however, that the other employees cited for insubordination were similarly situated. Barutio's testimony was that the discipline an employee receives depends upon factors such as the employee's seniority and the nature of the insubordination. Barutio believed that Roberts' acts merited termination because they occurred within several days of each other and were highly visible on the production floor. Although one other employee who had committed several acts of insubordination within several days received a disciplinary

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[6]As further evidence of a "set-up," Roberts argues that because the memorandum Blake prepared for Roberts' personnel file is captioned "Termination," the jury could infer that Crane knew on the date of his suspension that Roberts would be terminated. Blake, however, testified that he hand-wrote the memorandum and that the secretary who typed the memorandum presumably added the caption. Barutio corroborated Blake's testimony, testifying that he received a copy of Blake's handwritten memorandum and that it did not contain the caption.

lay-off rather than termination. Roberts neither offered any evidence of that employee's seniority nor showed that the employee's acts were similarly visible. Still another employee was not discharged for insubordination until he had engaged in acts more insubordinate than Roberts'. Those acts were separated by intervals of at least several months, however, and the record does not reveal that employee's seniority or the visibility of his insubordinate acts. Although Roberts may have had reason to believe that his termination was a sanction disproportionate to the conduct that precipitated it, the degree of discipline was a matter committed to Crane's discretion. So long as the exercise of that discretion was not motivated by an unlawful consideration, it is beyond our power to review it.

We conclude that the evidence, viewed in the light most favorable to Roberts, establishes only that Roberts was terminated because he failed to follow his supervisor's orders. Accordingly, the district court should have granted Crane's motion for judgment as a matter of law.

B. The Union

The union argues that the evidence is insufficient to support the Jury's conclusion that the union refused to investigate Roberts' grievance and pursue his claim to arbitration because it perceived him as having HIV or AIDS. We agree. It is undisputed that Soutier, who was responsible for determining whether Roberts' grievance should be pursued

to arbitration, had not met Roberts before the third step hearing and thus did not have first-hand knowledge of Roberts' physical condition. Soutier denied ever hearing rumors that Roberts had HIV or AIDS, and Roberts introduced no evidence suggesting that Soutier held such a perception.

Roberts alleges that "it is undisputed that the shop steward, [Monehan] . . . clearly had knowledge of Plaintiff's perceived disability." Roberts failed, however, to show that Monehan was a decisionmaker involved in the union's decision not to arbitrate. Monehan's involvement in the grievance process consisted of suggesting to Roberts that he file a grievance, requesting that Barutio give Roberts a disciplinary layoff in lieu of termination, and attending the hearing. Roberts produced no evidence showing that Monehan played any role in the decision not to arbitrate Roberts' grievance, and any alleged perception on his part is therefore insufficient to support an inference of discrimination by the union. See Herrero v. St. Louis University Hospital, 109 F.3d 481, 484 (8th Cir. 1997); Bradford v. Norfolk Southern Corp., 54 F.3d 1412, 1421 (8th Cir. 1995).

Even if Monehan could be considered a union decisionmaker, Roberts' evidence is insufficient to support his contention that Monehan "clearly had knowledge of Plaintiff's disability." Roberts points out that when Monehan was asked at trial how he had recalled Roberts' physical description during his deposition, Monehan replied, "I think what I told you that what I had seen on a person that would

been [sic] ill in the effect of HIV virus that it was someone real skinny and dried up like you see on TV." Even construing this less-than-clear statement as indicating that Monehan thought that Roberts physically resembled someone with HIV, his belief that Roberts exhibited symptoms which might be associated with HIV does not necessarily show that he believed Roberts had HIV. See Webb, 102 F.3d at 960; Aucutt, 85 F.3d at 1319. Roberts offered no evidence showing that Monehan's statement, if construed to relate specifically to Roberts, was more than an observation of Roberts' appearance. Roberts asserts that Monehan was nearby when a co-worker made a joke suggesting that Roberts had AIDS, but his two-tiered assumption that Monehan might have heard the joke and that hearing such a joke caused him to believe Roberts had HIV or AIDS is mere speculation insufficient to support a finding of discrimination. Hedberg, 47 F.3d at 932.

The judgment is reversed, and the case is remanded to the district court with instructions to enter judgment in favor of Crane and the union. The cross-appeal is dismissed as moot.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-2432/2437/2440 3445EMSL

Karl Roberts,	*	
Appellee,	*	Order Denying Petition
	*	for Rehearing and
v.	*	Suggestions for Rehearing
	*	En Banc
District No. 9. International	*	
Association of Machinists	*	
and Aerospace Workers,	*	
et al.,	*	
Appellants.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

November 28, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

JUDGMENT
FILED, FEBRUARY 26, 1996
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Order and Memorandum Opinion
Filed, February 26, 1996
Page 21

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

KARL ROBERTS,	)	
Plaintiff,	)	
	)	
vs.	)	No. 4:94CV2101-DJS
	)	
UNIDYNAMICS	)	
CORPORATION, d/b/a	)	
Crane National Vendors,	)	
and DISTRICT NO. 9,	)	
INTERNATIONAL	)	
ASSOCIATION	)	
OF MACHINISTS AND	)	
AEROSPACE WORKERS,	)	
Defendants.	)	

JUDGMENT

Pursuant to the jury's verdict and the memorandum opinion separately entered herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that judgment is entered in favor of plaintiff Karl Roberts and against defendant Unidynamics Corporation, d/b/a Crane National Vendors, in the amount of $234,822.00,

representing $24,822.00 in backpay and $210,000 in compensatory damages, plus costs and such post-judgment interest as is allowed by law at the applicable rate of 4.89%.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that judgment is entered in favor of plaintiff Karl Roberts and against defendant District No. 9, International Association of Machinists and Aerospace Workers, in the amount of $100,638.00, representing $10,638-00 in backpay and $90,000.00 in compensatory damages, plus costs and such post-judgment interest as is allowed by law at the applicable rate of 4.89%.

/s/
UNITED STATES DISTRICT JUDGE

Dated: 2/26/96

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

KARL ROBERTS,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	No. 4:94CV2101-DJS
UNIDYNAMICS	)	
CORPORATION, d/b/a	)	
Crane National Vendors, and	)	
DISTRICT NO. 9,	)	
INTERNATIONAL	)	
ASSOCIATION OF	)	
MACHINISTS AND	)	
AEROSPACE WORKERS,	)	
Defendants.	)	

ORDER and MEMORANDUM OPINION

The instant action was tried before a jury on plaintiff's claims that his former employer, defendant Unidynamics Corporation d/b/a Crane National Vendors ("Crane"), and his union, defendant District No. 9, International Association of Machinists and Aerospace Workers ("the Union"), discriminated against him on the basis of a perceived handicap, namely plaintiff's Graves' Disease and/or an

erroneous belief that plaintiff was infected with the Human Immunodeficiency Virus ("HIV") or had Acquired Immune Deficiency Syndrome ("AIDS"). More specifically, plaintiff alleges that Crane discriminatorily terminated his employment, and that the Union discriminatorily failed to adequately represent plaintiff in his grievance proceedings against Crane. Plaintiff asserts claims under both the Americans with Disabilities Act, 42 U.S.C. 512101 et *seq.*, and the Missouri Human Rights Act, §213.010 R.S.Mo. *et seq.*

The verdict form submitted to the jury contained a single blank for the jury's findings as to actual damages, which were defined in Instruction #20 to include both backpay and compensatory damages for "emotional pain, suffering, inconvenience and mental anguish." Because the substantive law of the ADA and the MHRA are the same as applicable to plaintiff's claims, the jury instructions generally, and the verdict form in particular, made no distinction between plaintiff's claims under the different statutes. None of the parties objected to these aspects of the verdict form. The jury found in plaintiff's favor as against both defendants, and further found, with respect to each defendant, that it had not been proven by a preponderance of the evidence that the defendant would have treated plaintiff in the same manner regardless of any perceived disability. The jury found plaintiff's aggregate actual damages to be $535,000.00.

The matter is before the Court on defendants' separate motions for the amendment and reduction of the jury's

damages award based on the limitations imposed by 42 U.S.C. §1981a(b)(3) on an award of compensatory damages under the ADA. Plaintiff argues in response that the total award can be construed as made under the MHRA, pursuant to which there is no quantitative cap on compensatory damages. Defendants take the position that plaintiff cannot recover any compensatory damages of the type here sought under the MHRA, because Missouri law requires expert medical testimony to support any 'claim of emotional distress damages, and plaintiff's belated attempt to name a medical expert witness for this purpose was defeated when the Court granted defendants' motion to strike the expert as untimely designated.

Plaintiff first argues that the actual damages which courts have found to be available under the MHRA are of several types -- loss of enjoyment of life, shame, humiliation, mental anguish and emotional distress, for example -- and that expert medical testimony would be required only to recover for emotional distress, but not for the other types of non-pecuniary loss for which damages are available. The Court is not persuaded, based in large part on its review of Bass v. Nooney Co., 646 S.W.2d 765 (Mo.banc 1983), the case in which the Missouri Supreme court rejected the old "impact rule" and instituted the requirement that emotional distress be "medically diagnosable and... of sufficient severity so as to be medically significant" in order to be compensable. Id. at 772-773. Subsequently, Bass has been interpreted "to require expert medical testimony when no physical injury is

involved." Glover v. McDonnell Douglas Corp., 981 F.2d 388, 395 (8th Cir. 1992) (see also cases cited therein).

In Bass, the Supreme Court used the term "mental injury" as well as "emotional distress," which suggests that the scope of its holding is not so limited as plaintiff contends. Furthermore, in enunciating this test, the court noted that it "responds to well considered suggestions by legal writers" which the court quoted at some length. Id. at 773, n.4. Among the discussions which the court cited with approval is one advocating a "middle ground... definition of 'emotional harm' which excludes mere upset, dismay, humiliation, grief, and anger," because such emotions do not justify the imposition of liability. Id., quoting Comment, Negligence and the Infliction of Emotional Harm: A Reappraisal of the Nervous Shock Cases, 35 U.Chi.L.Rev. 512, 517 (1968). Against such a background, the court concludes that the Bass test, where it applies, is intended to be applicable to all forms of emotional or mental injury, however described.[1]

Plaintiff's next argument rests on his interpretation of a recent Missouri Court of Appeals decision and the line of cases on which it is based. In Fust v. Francois, No. 66740,

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[1]This analysis instructs that it may be ill-advised to use more particular terms to illustrate types of emotional harm, and that perhaps the simple use of "emotional distress" as a general term is preferable. For example, in Instruction 120 in this case, the Court would readily conclude that "emotional pain," "suffering" and "mental anguish" were used merely as descriptive variations or species of emotional distress.

1995 WL 593016 (Mo.App. 1995), a malicious prosecution suit, the Court of Appeals reviewed and adhered to a line of malicious prosecution and false imprisonment cases in which Missouri courts had distinguished Bass as inapplicable and held that emotional distress damages "may be presumed to flow from the malicious prosecution without the need for medical testimony." Id., slip op. at 19. The holding in Fust is, in the Court's view, clearly limited to the malicious prosecution and false imprisonment contexts. Of the three underlying cases, Lipari v. Volume Shoe Corp., 664 S.W.2d 953 (Mo.App. 1983) fails to discuss and distinguish Bass, which was decided earlier the same year, and Hupp v. North Hills Lincoln-Mercury, 610 S.W.2d 349, 356-57 (Mo.App. 1980), predates Bass.

The third, Signorino v. National Super Markets, 782 S.W.2d 100, 104 (Mo.App. 1989), distinguishes Bass as applicable only to negligence claims and not to intentional torts. Both the Eighth Circuit and this Court, however, have applied the Bass standards to MHRA claims since Signorino was decided, see Glover, 981 F.2d at 395, and Heller v. Heritage Environmental Services, Inc., 835 F.Supp. 1124, 1126 (E.D.Mo. 1993) [Jackson, J.]. This precedent directly on point binds and informs this Court's determination of the issue and is not seriously challenged by the general dictum in Signorino. Furthermore, Missouri courts have applied the Bass standards to claims of intentional infliction of emotional distress in the employment context notwithstanding Signorino, which further bolsters the conclusion that

Signorino is limited to its factual and legal context. See Duncan v. Creve Coeur Fire Protection District, 802 S.W. 2d 205, 207 (Mo.App. 1991); Hendrix v. Wainwright Industries, 755 S.W.2d 411, 412 (Mo.App. 1988). For all the reasons stated above, the Court rejects plaintiff's contention that compensatory damages for emotional distress may be construed to be awarded in this case under the MHRA rather than the ADA.

The Court also rejects plaintiff's argument that the amount of damages rendered by the jury may include, in addition to backpay, recovery for plaintiff's "inability to procure healthcare coverage in the future." Pltff. Response in Opp. filed 10/6/95 [Doc. #149], p.3. The jury is presumed to have followed the Court's instructions, and the scope of actual damages as set out in Instruction #20 does not encompass such an award for future loss or expense, which is, as defendants point out, instead within the parameters of frontpay and an issue for the Court's determination. Neither did plaintiff present evidence which would have supported an award of damages of this kind. This argument, too, fails to shield any portion of the damages award from scrutiny under 42 U.S.C. §1981a.

Plaintiff's final contention is that defendants are precluded from seeking a reduction of the award due to their failure to object to the relevant language of Instruction #20 or to the manner in which damages are addressed in the verdict form. Because the chief difficulty presented is the determination how to apply the 5198la(b) (3) limitations on

compensatory damages where there are two defendants and damages are apportioned, the Court is not-persuaded that there was a pertinent objection which might properly have been made, given that the statute specifically forbids informing the jury of the statutory caps. See §1981a(c)(2). Similarly, the fact that the verdict form did not distinguish between damages under the MHRA and under the ADA was not of itself objectionable:

> [Plaintiff's] causes of action are simply alternate theories seeking the same relief. In this situation, a plaintiff is not entitled to a separate compensatory damage award under each legal theory. On the contrary, he is entitled only to one compensatory damage award if liability is found on any or all of the theories involved.

Greenwood Ranches, Inc. v. Skie Construction Co., Inc., 629 F.2d 518, 521 (8th Cir. 1980).

Although the failure to make a proper objection may constitute a waiver of error in jury instructions or a verdict form, see Fed.R.Civ.P. 51, a "narrow exception" is "reserved for plain error which would result in a miscarriage of justice if the challenged instruction and verdict were allowed to stand." Denniston v. Burlington Northern, Inc., 726 F.2d 391, 393 (8th Cir. 1984); see also Nebraska Public Power Dist. v. Austin Power, Inc., 773 F.2d 960, 972 (8th Cir. 1985). Even

if a proper objection had been available on the pertinent points, a waiver of such an objection resulting in substantial damages in excess of applicable statutory maximums would, in the Court's view, constitute a miscarriage of justice which would override the waiver. For each and all of the foregoing reasons, the Court concludes that the issues now before it on defendants' motions were not waived by defendants' failure to object to the relevant aspects of the verdict form.

Having disposed of these threshold issues, the Court must now address the parsing of the jury verdict as rendered. Plaintiff fails to contest, and therefore concedes, defendants' assertion that plaintiff sought backpay in the amount of $35,460.00. This fact is also established by the trial record itself. The plaintiff testified to that amount as his lost income. Transcript, Vol. 3, p.23. In closing argument, plaintiff's counsel referred to that testimony, and specifically asked the jury to award $35,460.00 in backpay. Transcript, Vol. 7, p.21. Plaintiff further sought a compensatory damages award of $600,000. Id. at 22.

The Court therefore readily concludes that of the $535,000 jury award, $35,460 represents backpay and $499,540 represents compensatory damages.[2] The defendants agree with this extrapolation, and plaintiff has not

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[2]This compensatory damages figure of roughly $500,000 appears to indicate that the jury agreed to award much but not all of the $600,000 in compensatory damages which plaintiff requested.

contested it. The Court is then faced with determining how to apply the limitations of §1981a (b) (3), given several circumstances present here which are not contemplated by the statute: the involvement of multiple defendants, one of whom is not sued as an employer, and as to which liability is to be apportioned according to the jury's verdict. The two defendants propose different methods of applying the statutory caps and percentages of apportionment, and plaintiff has not proposed any, choosing instead to rely on the arguments, discussed above, in support of preservation of the entire damages award.

Pursuant to §1981a(b)(3), plaintiff's total compensatory damages are subject to a cap which ranges from $50,000, "in the case of a respondent who has more than 14 and fewer than 101 employees," to $300,000, "in the case of a respondent who has more than 500 employees." The Court's application of the statute parts from both defendants' in that the Court deems the Union to be subject not to the limitation dictated by the small number of its employees, but by the number of its members. District No. 9's business representative Robert Soutier testified at trial that the district "is comprised of approximately 11 local lodges throughout its geographic area," with a total membership of 12,000 in approximately 400 bargaining units. Transcript, Vol. 6, pp. 127-28. District No. 9 has only 21 employees. Id. at 128-29. Because the Union is sued in its capacity as a union, and not as an employer, and because the size of its membership is far more indicative of its financial size and strength than its

number of employees, the Court would predicate the application of the statutory cap on the membership figure, yielding the maximum $300,000 cap. Consideration of defendant Crane yields the same cap, because Crane has more than 500 employees. See Transcript, Vol. 6, pp. 5-6 (testimony of Edwin J. Barutio, Vice President of Human Resources).

Bearing in mind that the jury apportioned Crane's liability at 70% and the Union's at 30%, the Court would calculate the defendants' shares of the compensatory damages as their respective percentages of the maximum $300,000 award, i.e., $210,000 for Crane and $90,000 for the Union.[3] This calculation preserves both the relative apportionment fixed by the jury, which Crane's proposed solution would not do if applied to both defendants. The Court's calculation also limits plaintiff's total compensatory damages to the maximum allowed by the statute, which the Union's proposed solution would not do if applied to both defendants. The Court will likewise apportion the backpay award of $35,460, and assess 70% or $24,822 against crane and the remaining 30% or

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[3]The Court also notes that if the membership of plaintiff's own bargaining unit were used to determine a cap on the Union's compensatory damages liability, the figure yielded by the Court's method would not exceed it. L.C. Monehan, the chief steward of plaintiff's bargaining unit, testified that the unit contained between 300 and 350 employees, which falls within the $200,000 cap of §19 8 la (b) (3) (C) . See Transcript, Vol. 6, p. 106.

$10,638 against the Union.

Although the Court has not adopted the particular method of calculation -urged by either defendant, the Court will consider Crane's "Motion for Amendment of Jury Verdict" and the Union's "Motion to Reduce the Verdict" each to be granted in part, based on the Court's agreement that the application of §1981a(b)(3) requires the reduction of the jury's compensatory damages award. The damages against each defendant based on the jury's verdict and the Court's application of §1981a(b)(3) are as follows:

Defendant Crane	$210,000 in compensatory damages
	+ 24,822 in backpay
	$234,822
Defendant	
District No. 9	$ 90, 000 in compensatory damages
	+ 10,638 in backpay
	$100,638

The Court next proceeds to consideration of the award of any equitable relief, namely reinstatement or frontpay.

The equitable remedies of reinstatement and frontpay are before the Court for its determination. Having considered the pleadings, the testimony of the witnesses, the documents in evidence, and the stipulations of the parties, and being fully

advised in the premises, the Court makes the following findings of fact and conclusions of law relevant to the issues of reinstatement and frontpay.

Findings of Fact

1. Plaintiff Karl Roberts began employment as a welder with defendant Unidynamics, Corporation, d/b/a Crane National Vendors ("Crane")' on or about January 9, 1989.

2. During his employment with Crane, plaintiff was a member of Lodge 1345 of defendant District No. 9, International Association of Machinists and Aerospace Workers ("the Union") , and was covered by a collective bargaining agreement between Crane and the Union.

3. On October 6, 1992, Crane suspended plaintiff Is employment pending investigation of charges of insubordination by his supervisor, Dennis Blake; the suspension was converted to a discharge on October 81 1992.

4. On October 6, 1992, plaintiff filed a grievance protesting his suspension, which was later construed by all parties as directed to plaintiff's discharge.

5. At the October 20, 1992 meeting on plaintiff's grievance, Robert Soutier, a Union business representative, represented plaintiff and sought plaintiff's reinstatement with lost pay and benefits plus retroactive seniority.

6. By letter dated October 27, 1992, Crane informed the Union that it denied plaintiff's grievance and would not reinstate him.

7. By letter dated November 17, 1992, Soutier

advised plaintiff that the Union would not process his grievance further.

8. At the conclusion of a six-day trial conducted on September 12, 13, 14, 15, 18 and 19, 1995, a jury returned its verdict finding in favor of plaintiff and against both Crane and the Union on plaintiff's claims that defendants discriminated against him based on their perception that plaintiff was disabled by Graves' Disease, HIV and/or AIDS, Crane by discharging plaintiff and the Union by failing to represent plaintiff adequately in the grievance proceedings.

9. In its verdict, the jury found that plaintiff's backpay and compensatory damages totaled $535,000, and apportioned liability 70% to Crane and 30% to the Union.

10. Following his October 8, 1992 termination, plaintiff was next employed by Caseyville Auto Salvage in July of 1993, where he remained employed at the time of trial, earning approximately $9.00 per hour.

11. With Caseyville Auto Storage, plaintiff works in sales and does not employ skills similar to those he utilized as a. welder for Crane.

12. Plaintiff was very briefly employed by American Steel Foundries, from August 11 through August 16, 1994, at an hourly wage rate of $10.89, which exceeded his $10.39 hourly wage with Crane at the time of his termination.

13. Plaintiff voluntarily terminated his employment with American Steel, walking off the job without formal notice on August 16, 1994.

14. Had plaintiff remained employed with American Steel and completed the 45-day probationary period, the applicable collective bargaining agreement between American Steel and the United Steelworkers of America would have provided plaintiff with benefits including medical insurance, vacations and pension which were equal to or greater than the benefits he received during his employment with Crane.

15. Although plaintiff testified that he quit his job with American Steel based on his dissatisfaction with and concerns about working conditions including smoke, dust and heat, plaintiff also admitted that he sought no accommodation or protective device, such as a mask which he was aware some other employees wore.

16. Plaintiff made no complaints to his supervisors or to regulatory authorities concerning the working conditions which he claims prompted his voluntary termination.

17. Plaintiff's decision to quit his employment at American Steel was not based on the advice of a physician.

18. Numerous other employees of American Steel were daily exposed to the same conditions which plaintiff claims motivated his voluntary termination.

19. Since he began work at Caseyville Auto salvage in July of 1993, plaintiff has made no attempts to find different employment, other than his brief tenure with American Steel, even during the period in October 1994 during which he was laid off from Caseyville Auto Salvage.

Conclusions of Law

Defendant Crane is an employer within the meaning of the Missouri Human Rights Act and the Americans with Disabilities Act. Defendant Union is a labor organization within the meaning of both statutes. Under both statutes, the equitable remedies of frontpay and reinstatement are issues for the Court's determination. The remedies are "alternative, rather than cumulative," and frontpay is generally considered only where reinstatement is "inappropriate or infeasible." Suggs v. ServiceMaster Education Food Management, 72 F.3d 1228, 1234 (6th Cir. 1996).

Plaintiff requests reinstatement, which Crane opposes. The Union supports reinstatement as the preferred of the two alternatives, and argues that if reinstatement is not ordered due to Crane's opposition, that Crane alone should bear any frontpay which is awarded to plaintiff. Crane asserts, and plaintiff concedes, that if plaintiff were reinstated to his former position with Crane he would again be under the direct supervision of Dennis Blake, whose charges of insubordination led up to plaintiff's termination. Plaintiff further concedes in his proposed conclusions of law that his reinstatement would "create a strong likelihood of tension and animosity affecting the supervisory authority." Pltff. Proposed Findings of Fact, p. 3.

Upon careful consideration, the Court finds that reinstatement is not an appropriate remedy in this case. In light of all the evidence, and particularly in view of the

relevant testimony of plaintiff and of Dennis Blake, both its content and the attitude the testimony reflected on the part of each witness concerning the other, the Court concludes that there exists too great a likelihood of continuing antagonism and hostility such that "a productive and amicable working relationship would be impossible." EEOC v. Prudential Federal Savings & Loan Ass'n, 763 F.3d 1166, 1172 (10th Cir. 1985), *quoted in* Brooks v. Woodline Motor Freight, Inc., 852 F.2d 1061, 1065 (8th Cir. 1988).

Turning next to consideration of an award of frontpay, the following factors have been identified as relevant:

> (1) the employee's future in the position from which [he] was terminated; (2) [his] work and life expectancy; (3) [his] obligation to mitigate his damages; (4) the availability of comparable employment opportunities and the time reasonably required to find substitute employment; [and] (5) the discount tables to determine the present value of future damages.

Suggs, 72 F.3d at 1234. Furthermore, "[d]etermination of when to award front pay is within the discretion of the trial court, and such awards are reviewed under the abuse of discretion standard." Id. The Court concludes that a number of relevant considerations counsel against the award of any frontpay.

The plaintiff failed to adduce evidence on either of the first two factors, concerning his job future at Crane and his

work and life expectancies. The trial record does not reveal plaintiff's age (although it is asserted in plaintiff's proposed findings of fact and conclusions of law) and contains no testimony or stipulation which might support a finding concerning the number of years plaintiff will continue to work. Neither does the record contain evidence concerning plaintiff's job history, which might be relevant to a conclusion as to plaintiff's expected tenure with Crane. The insufficient evidentiary basis for a determination of front pay is compounded by lack of any proof as to the present value of plaintiff's claimed future damages. Plaintiff did not present an expert to support a claim for frontpay, and has not used discount tables, as indicated in the fifth factor above, to determine present value. As the D.C. Circuit has noted:

> The plaintiff bears the initial burden of providing the district court "with the essential data necessary to calculate a reasonably certain front pay award," including "the amount of the proposed award, the length of time the plaintiff expects to work for the defendant, and the applicable discount rate."

Barbour v. Merrill, 48 F.3d 1270, 1279 (D.C. Cir. 1995), quoting McKnight v. General Motors Corp., 973 F.2d 1366, 1372 (7th Cir. 1992). An award of frontpay cannot be "unduly speculative." Dunlap-McCuller v. Riese Organization, 980 F.2d 153, 159 (2nd Cir. 1992) ; see also Reneau v. Wayne Griffin & Sons, Inc., 945 F.2d 869, 870

(5th Cir. 1991).

With respect to the third factor, the Court finds that plaintiff failed to satisfy his obligation to mitigate his damages following termination by Crane. Plaintiff adduced no proof explaining his failure to obtain employment between his October 8, 1992 termination by Crane and his July, 1993 employment with Caseyville Auto Salvage, and the Court, as finder of fact relevant to the issue of frontpay, is not persuaded that plaintiff made good faith attempts during this period to mitigate his damages by seeking other employment. This conclusion is also relevant to the fourth factor listed above.

In addition, plaintiff's decision to terminate his employment with American Steel was not sufficiently justified to warrant the imposition of frontpay liability on the defendants so as to make plaintiff whole for the relatively small differential in pay between his employment with Crane and his continuing employment with Caseyville Auto Salvage. The Court concludes, for the reasons stated in Findings of Fact #12 through #18 above, that plaintiff's rejection of the job opportunities with American Steel was so abrupt and ill-considered as to be unreasonable for purposes of mitigation of his frontpay damages. Furthermore, plaintiff has otherwise remained in a slightly lower paying position without any attempt to secure skilled employment of the better-paying variety he obtained with both Crane and American Steel. "Front pay may be denied or reduced when the employee fails to mitigate damages." Reneau, 945 F.2d

at 870; see also Hansard v. Pepsi-Cola Metropolitan Bottling Co., 865 F.2d 1461, 1470 (5th Cir. 1989); Dominic v. Consolidated Edison Co., 822 F.2d 1249, 1258 (2nd Cir. 1987). For all the foregoing reasons, the Court does not deem an award of frontpay to be appropriate on the proof and circumstances presented in this case. Based on its determinations of the issues concerning compensatory damages and apportionment of liability, the Court will separately enter judgment in the amounts indicated on page 10 above.

Accordingly,

IT IS HEREBY ORDERED that defendant Unidynamics Corporation's motion for amendment of jury verdict [Doc. #146] and defendant District No. 9's motion to reduce the verdict [Doc. #147] are granted in part and denied in part.

/s/
UNITED STATES DISTRICT JUDGE

Dated: 2/26/96

APPENDIX C

EXHIBITS AND INSTRUCTIONS

October 9, 1992

Karl Roberts
402 Clarence
Collinsville, Illinois 62234

Dear Mr. Roberts:

Your suspension of Tuesday, October 6, 1992, for insubordination has been changed to a termination effective October 8, 1992. Enclosed is your final check including all accrued vacation pay.

Sincerely,

NATIONAL VENDORS

/s/ Kay Merz

Kay Merz
Human Resources Manager

cc:
Art Klopstein
Bob Soutier
Ron Wilson
L.C. Monehan

DATE: October 6, 1992

TO: FILE

FROM: Dennis Blake

SUBJECT: Karl Roberts (Termination)

On October 5, 1992, as I passed through Karl Roberts' work area, I noticed an empty spool of wire lying on the floor. I asked Karl if he knew anything about the empty spool, or how it got there. He looked surprised, and then turned away and sarcastically denied any knowledge of the spool. I told him I thought it would be a good idea if he picked it up, and I left the area. The next day as I passed through Karl 's work area, I noticed the empty spool was still lying on the floor where it had been the day before. I asked Karl :f he was going to pick up the empty spool as I had asked him the day before. He did not answer me. I told him I would make it an order if I had to. He turned away and mumbled something. I could not hear what he said. It was apparent to me that he was not going to pick up the spool. I told him that it was now an order; he should pick up the spool. Karl said, "No, I don't like the way you said it," and turned away and started welding. I told him to stop, that I wanted to make sure that he understood that I was living him a direct order to pick up the spool. He said, "I heard you." But he made no effort to

pick up the spool. He started to weld again.

I then left his area, returned to my desk, and called Kay Merz in Human Resources. I explained to her what had just happened; she agreed that it was blatant insubordination and suggested suspension of the employee. I agreed and told her I would inform Ron Wilson. I immediately went to see Ron Wilson and explained the situation to him. I told Ron that I had contacted Kay Merz, and I was going to suspend Karl Roberts. He agreed, and we returned to the Weld Department together. Along the way, we contacted L.C. Monehan, the Chief Shop Steward. Ron and I told L.C. what had transpired, and that Karl was to be suspended pending further investigation.

When we arrived at Karl's work station, he was standing in front waiting for us. Ron asked Karl if he had been instructed by his Supervisor to Dick up the empty wire spool. Karl exploded and denied any knowledge of the spool. Ron told Karl that when he was given instructions by a Supervisor, he was to follow those instructions. Karl shouted at L.C., "Can he do that, L.C.? Can he tell me do anything he wants? Can he tell me to tell him what color underwear I have on?" L.C. explained to Karl that he had to carry out the instructions of his Supervisor.

INSTRUCTION NO. 14

In order for plaintiff Karl Roberts to establish his claim of intentional discrimination by defendant National Vendors, he has the burden of proving the following essential elements by a preponderance of the evidence:

One, that defendant National Vendors perceived plaintiff as disabled by Graves' Disease, HIV and/or AIDS, as the term "disabled" is defined in these instructions;

Two, that defendant National Vendors intentionally discriminated against plaintiff because of the perceived disability, that is, that the perceived disability of plaintiff was a motivating factor in defendant National Vendors' decision to terminate the plaintiff; and

Three, that as a direct result of defendant National Vendors' intentional discrimination, the plaintiff sustained damages.

If any of the above elements has not been proven by a preponderance of the evidence, your verdict must be for defendant National Vendors.

INSTRUCTION NO. 15

In order for plaintiff Karl Roberts to establish his claim of intentional discrimination by defendant District No. 9, he has the burden of proving the following essential elements by a preponderance of the evidence:

One, that defendant District No. 9 perceived plaintiff as disabled by Graves' Disease, HIV and/or AIDS, as the term "disabled" is defined in these instructions;

Two, that defendant District No. 9 intentionally discriminated against plaintiff because of the perceived disability, that is, that the perceived disability of plaintiff was a motivating factor in defendant District No. 9's representation of the plaintiff in the grievance proceedings against National Vendors; and

Three, that as a direct result of defendant District No. 9's intentional discrimination, the plaintiff sustained damages.

If any of the above elements has not been proven by a preponderance of the evidence, your verdict must be for defendant District No. 9.

APPENDIX D

TRIAL TRANSCRIPT (PARTIAL)

TRANSCRIPT VOLUME 2

*** (TR beginning at page 125 line 2) ***
Testimony of Karl Roberts (Plaintiff)

Q. Now, I'm going to draw your attention to the year 1992. In the spring of that year did you become ill in any way?
A. Yes.
Q. Can you tell, first of all, the jury when, what time of year you first became ill?
A. It was in May of '92 with rapid weight loss, eyes were burning, they were burning so bad I had to wear sunglasses to work, nervousness, that's about it.
Q. Did it also cause diarrhea?
A. Yes, severe.
Q. As to the diarrhea, approximately how may times a day did you have to use the rest room?
A. 20, 30.
Q. And did you know at that time what it was you had?
A. No.

*** (TR beginning at page 126 line 20) ***

Q. During the spring of 1992 then, could you tell the jury who your supervisor was?
A. Dennis Blake.
Q. And what department was he the supervisor of?

A. Department 41, weld department.

Q. Was he the supervisor when you first began with Crane in 1989?

A. Yes.

Q. Was he there throughout 1990?

A. Yes.

Q. 1991?

A. Yes.

Q. 1992?

A. Yes.

Q. All right. Prior to the weight loss you suffered in 1992, what did you weigh in the beginning of that year?

A. Of 1989?

Q. 1992.

A. '92, 100 -- at the beginning or end, I'm sorry.

Q. Before the illness.

A. Before the illness, 220, approximately.

Q. Okay. And when you first reported to a physician, do you recall what you weighed then?

A. 160.

Q. Okay. And what physician did you go see?

A. Dr. Lynch.

Q. Now, is there a reason why you go to see a physician?

A. I was so weak.

Q. Did Dennis Blake specifically request you to see your physician?

A. Yes.

Q. All right. And did he ask you to inform him of what

was wrong with you?

A. Yes, he did.

Q. Okay. When are you eventually diagnosed with something?

A. I'd say June of '92.

Q. Okay. And do you inform Mr. Blake of what it was you'd been diagnosed with?

A. Yes.

Q. What did you tell him you were diagnosed with?

A. Graves' disease.

Q. Did he have a response to that, a reaction?

A. Looked surprised.

Q. Briefly, could you tell the jury what is, to your understanding, Graves' disease?

A. It's a hyperthyroid, I guess an overactive one, it's a regulator of your body, the way I understand it. It regulates all your organs and tells them what to do. Mine was malfunctioning, overactive type, and making them all work without stopping, I guess.

Q. So you were first diagnosed in June of 1992?

A. Yes.

*** (TR beginning at page 129 line 21) ***

Q. (BY MR. BAGSBY:) In June, shortly after June 1992, do you move to the paint department?

A. Yes.

Q. And when you moved to the paint department was

there special equipment you were required to wear?

A. Yes.

Q. And was that plastic equipment, plastic gear?

A. It was respiratory, gloves, and a plastic overall suit.

Q. Did you have nay difficulty in performing the functions of the paint department?

A. Yes, I did.

Q. What specifically was wrong?

A. Heat exhaustion, heart was beating fast. Just couldn't handle the heat.

Q. As a result of going through this experience with the paint department, were you required to undergo any medical care because of that?

*** (TR beginning at page 132 line 18) ***

Q. (BY MR. BAGSBY:) Karl, going back to this question. Were you required in any way to undergo any kind of medical treatment as a result of your burn scars in the paint department?

A. No.

Q. Up to this point in time, July of 1992, you're in the paint department and you're taken out, correct?

A. Right.

Q. And then you go back to the weld department, right?

A. Yes.

Q. What month do you go back to the weld department?

A. In July of '92.

Q. Do you know if it was the beginning of the month, end of the month?

A. Towards the end.

Q. Up to this point in time had you ever, since 1989, the day you were hired up to that point, ever been written up for or cited for being insubordinate --

A. No.

Q. --in any way of a violation of a company rule?

A. None.

*** (TR beginning at page 134 line 23) ***

Q. (BY MR. BAGSBY:) Anytime during August or September of 1992, does Dennis Blake make any derogatory statements to you?

A. I don't know what derogatory is.

Q. Demeaning or threatening to you.

A. He told me that I was a liability to the company.

Q. Okay. Now, when did he say that to you?

A. He said that to me in July or August.

Q. Okay. Now, did he put that in any kind of context? Did he say I'm talking about this or I'm talking about that?

A. After I got back from the paint department he just told me that I was a liability to the company and suggested I find another job.

Q. Is that the extent of the conversation?

A. Yes.

Q. Was anybody else around?

A. No.

Q. Were you alone?

A. Yes.

Q. Where were you?

A. I was at the gum and mint station by myself.

Q. I'm going to draw your attention to September 30, 1992. Do you recall an incident regarding Mr. Blake requesting to see a note that you had written?

A. Yes, I do.

Q. Could you briefly explain to the jury what that incident was?

A. Well, I was on my break, I was writing a note to one of my friends and went over to Dennis's desk to use a piece of scratch paper, which everybody uses for writing down inquires for production and stuff, and I figured it was there for everybody if they just needed it for any reason. I was writing a note, like I said on my break to one of my fellow workers, and went back to my work station and wrote it and didn't like it so I went back to Dennis's desk and I got another piece of scratch paper, wrote another one.

Q. Let me stop you there. Was anyone else sitting at the desk of Dennis Blake?

A. Yes, Marvin Mullen was. He always takes his break at Dennis's desk. I don't take my break at his desk but Marvin Mullen always does.

Q. Listen to my questions. Is Marvin Mullen a co-worker of yours?

A. Yes, he is.

Q. Was he there the entire time that you were on break?

A. Yes.

Q. Do you take breaks at the same time?

A. Yes.

Q. They end the same time?

A. Yes.

Q. And does Dennis Blake approach you at the desk?

A. Yes.

Q. And what does Dennis Blake request of you?

A. He just tells me that he wants to see the note I'm writing and I told him no, I said it's private. He says, "I want to see it" and I said, "No, it's private." We argued a little bit longer and he just kept demanding to see it and I kept telling him no. So I tried to get to my work station and on my way back over there Dennis was right behind me, kind of hounding me about it. When I made it to my work station he demanded to see it again and I said no and then he gave me a direct order. His direct order, "I want to see the note." I said, "No, it's private and I don't think I have to show it to you." Then he gave me another direct order, he wants to see it. I said, "Let's see what L.C. Monihan's got to say about it."

*** (TR beginning at page 138 line 1) ***

weld department?

A. He's in the paint department. I'm in the weld department.

Q. Does Mr. Blake summon Mr. Monihan?

A. Yes.

Q. What happens and what transpires once Mr. Monihan arrives?

A. Mr. Monihan arrives, he comes there and he says, "What's going on?" Dennis says that Karl's refusing to show me a note and he said it was wrote on company time. I said it wasn't wrote on company time. L.C. said, "Well, let me see it" and I showed it to L.C. He said, "Just show it to him."

Q. What did the note say?

A. It says, "Charlie, this is Catfish, are you mad at me?"

Q. Is that the extent of the note?

A. Yes.

Q. Who's Catfish?

A. That's me.

Q. Charlie is who?

A. A co-worker.

Q. What's his last name?

A. Goodson.

Q. Did Mr. Blake then cite you for being insubordinate?

A. No.

Q. Did he give you a verbal reprimand?

A. No.

Q. Did he give you a written reprimand?

A. No.

Q. Are you aware that he prepared a memo regarding that incident?

A. No.

Q. Did he tell you he was going to do that?

A. No.

*** (TR beginning at page 141 line 11) ***

Q. I want you to deal specifically with the 5th. Just try to relax. October 5th.

A. The 5th, I'm sorry. I was assigned to the big cabinet line on the 5th and I worked on it all that day and then Dennis walked up and he said to me, "Is that your spool?" and I said, "No." He says, "Do you know whose it is?" And I said, "No." He goes, "Did you throw it there?" I said, "No." He goes, "Well, pick it up." I said, "Okay." So I finished my day there.

Q. On the day of the 5th, does he point out where the spool is at?

A. No.

Q. Does he tell you where the spool is at?

A. No.

Q. Do you have a co-worker with you this day?

*** (TR beginning at page 142 line 21) ***

Q. Is there a company rule pertaining to clean-up time at the end of the day?

A. Yes, there is.

Q. What does the rule say, do you know?

A. I never did read it myself, but I seen people do it before. You're supposed to have five minutes at the end of

the day to wash up and clean your area.

Q. Do you recall ever seeing a spool laying out in the open?

A. On the 5th I didn't look and I didn't know and I didn't -- probably as soon as Dennis told me --

Q. Just answer my question. Confine yourself to my question.

A. Okay.

Q. Did you see a spool?

A. No.

Q. Does this persist over to October 6th?

A. Yes, it does.

Q. What happens on October 6th?

A. October 6th, I start out on a small cabinet line at the beginning of the day and I finished my eight hours there. Ten minutes before then Dennis comes by and asks me if I want to work overtime on the big line. And I said, "Yeah, I'll work overtime."

Q. Let me stop you there. Is that two separate lines?

A. Yes, they are.

Q. So he's moving you from one place to another?

A. Yes.

Q. Go ahead.

A. So he asked me to work overtime and I told him I would. So when my day was ended at the small line, at 15 after three, I moved over to the big cabinet line and they were running a tough cabinet. Me and Woolsey sat around there for a while until the cabinets started coming down for us.

When they did come down we was already 10, 15, 20 minutes behind. You can't get behind on these particular cabinets, if I remember right what kind they were. And anyway, Dennis comes by me like 25 minutes into that overtime, if I remember right, and he tells me, "I thought I told you to pick up a spool." At that time there I was only thinking about the 6th --

MR. LINIHAN: I'm going to object to that, Your Honor. The question was what did Mr. Blake say.

THE COURT: Let's limit it to what he said.

Q. (BY MR. BAGSBY:) Did Mr. Blake ask you about a spool?

A. Yes.

Q. What was your response?

A. He asked me how come you didn't pick up a spool, that spool.

*** (TR beginning at page 145 line 1) ***

or is your spool, what do you say?

A. On the 6th?

Q. The 6th.

A. I didn't tell him nothing. I just said it wasn't -- I said I didn't, you didn't tell me to pick it up on the 6th.

Q. When he approaches you on the 6th, what are you and Woolsey doing at the time?

A. We're working.

Q. Are you caught up?

A. No.

Q. Did Mr. Blake frequently push a policy of production first?

A. Absolutely, rule number one.

Q. And you were behind?

A. Yes.

Q. When he approaches you and asks you about the spool on the 6th, are you welding at the time?

A. Yes.

Q. Is Woolsey right next to you?

A. Yes.

*** (TR beginning at page 146 line 1) ***

Q. (BY MR BAGSBY:) How close is Woolsey?

A. Two or three feet.

Q. What else transpires after he mentions the spool?

A. After he mentions the spool? I just -- this is on the 6th, right?

Q. The 6th.

A. He comes up to me and says, "I thought I told you to pick up the spool." I said, "You didn't tell me to pick up the spool." He says, "Pick it up, that's an order." I told him, "I really don't appreciate the way you said that." And then he said, "Well, pick it up, that's an order." And I said, "Okay" and I started welding.

Q. Let me stop you there. Does he leave then?

A. Yes.

Q. Had he at any time told you to stop your production and pick this spool up?

A. No.

Q. Did he point out where the spool was on the 6th?

A. No.

Q. Did he tell you where the spool was on the 6th?

A. No.

Q. And he specifically did not say stop now?

A. No.

Q. Had you ever been given a request from 1989 up to 1992 to stop production and pick up a spool?

A. Never.

Q. What happens after he leaves?

A. After he leaves I start welding.

Q. Okay.

A. I'm welding and ten minutes pass by it seems like and I'm a pretty good welder anyway, so a break comes up in the line and I ask Woolsey, "Have you seen that spool that Dennis is talking about?" And Woolsey says, "No." I said, "Well, let's see if we can find that." I scanned the area, couldn't find it, and I looked down the rows. Where I was at ain't that big anyway, but there are 100 gun boxes, these four by four boxes everywhere, and I looked down aisles, between gun boxes, on top of them, in them, Woolsey looked. Neither one of us could find it anywhere. So at that point I assumed either Dennis picked it up himself or had somebody else do it. From there I was walking back and by the time I made it to my weld sation Ron Wilson, L.C. Monihan, and Dennis Blake were

already at my work station.

*** (TR beginning at page 148 line 1) ***

refusing a direct order from your supervisor by not picking up a spool. I told him that I couldn't find the spool. I said, "Where is it at, Dennis?" He says, "That's good enough. You are suspended pending further investigation." From that point, since all this stuff happened to me in a week, I was thinking --

MR. LINIHAN: I object to the witness testifying about his speculation.

THE COURT: Okay. Rephrase the question.

Q. (BY MR. BAGSBY:) Did you make any response back to either Mr. Wilson or Mr. Monihan once you found out you were suspended?

A. I told Ron Wilson, is who I was talking to, I said, "Ron, what am I supposed to do, show this guy the color underwear I got on if he asks me." I said, "He gives me two different orders. He says always keep production moving and he says then to pick up a piece of trash." I said, "I have to make a decision right there which one I feel is more important, the piece of trash or production. And Dennis's number one rule is production and I was following that order first. When I got a break in line" -- well, then he didn't want to hear no more of the story. Just told me to shut up pending further investigation and from that point there he suspended me and we walked to the bathroom to get my personal

belongings, me, L.C. and Ron Wilson did.

Q. You were hired on as a welder; is that right?

A. Yeah, a spot welder.

Q. That's what you got paid to do for at least three years, eight hours a day is to weld, right?

A. Yes.

Q. You didn't get paid to pick up trash, did you?

A. No.

Q. And there is a five minute break at the end of the day to pick up trash?

A. Yes.

Q. What transpires in the bathroom when you and Mr. Monihan go back there?

A. Me, Ron Wilson, Dennis Blake, and L.C. walked to the bathroom and Ron Wilson and Dennis stopped at the bathroom, me and L.C. walk in the bathroom to my locker to get my personal belongings. I said to L.C., I said, "What's going to happen to me over this?" He said, "You'll get suspended." I said, "I don't think I deserve it. I tried to find it, I can't find the spool that he's talking about." I said, "What should I do?" He said, "Go file a grievance right now." I said, "Where?" And he said, "At the Union hall."

Q. Did you then go down to the Union hall?

A. Yes, immediately.

*** (TR beginning at page 157 line 3) ***

Q. And again, who is Mr. Soutier?

A. The business representative.

Q. What was your understanding of why you even had to contact Mr. Soutier?

A. To take care of my suspension.

*** (TR beginning at page 157 line 21) ***

Q. (BY MR. BAGSBY:) What was the business representative going to do for you?

A. To straighten out the problem that I had, which was the suspension, and I guess to get my overtime that I lost at that particular time is what I was wanting him to do.

Q. You tried to contact Mr. Soutier?

A. Yes.

Q. How did you try to contact Mr. Soutier?

A. By phone.

Q. How many times did you try to contact Mr. Soutier?

A. Eight to ten.

Q. Did you leave messages with his secretary?

A. Every time.

Q. Did he ever call you back?

A. No.

Q. Did you ever reach him before the date of your grievance hearing?

A. Yes.

Q. Was this by phone?

A. Yes.

Q. What happens when you speak to him on the phone?

A. Just tell Bob basically what was on my grievance and told him in great detail what had happened and I asked him what would happen to me over this and he said I would get suspension as well. And I told him again that I don't think that I deserve suspension.

Q. Okay. Does he at that time say look, I'll let you know when the grievance hearing is coming up?

A. No.

*** (TR beginning at page 160 line 11) ***

Q. (MR. BAGSBY:) Now, were you aware that there was going to be grievance hearing at some point?

A. Yes.

Q. You knew that event was sometime going to happen?

A. Yes.

Q. Did anyone ever tell you when that was going to happen?

A. No.

Q. How did you find out about it?

A. Through a co-worker.

Q. Okay. When did you find out about it?

A. The night before my grievance.

Q. And at that -- it was not Mr. Monihan that contacted you?

A. No, sir.

*** (TR beginning at page 162 line 25) ***

Q. What happens when Mr. Soutier arrives?

A. He comes in, I guess I waved at him, he waves to me. I'm sitting at the table with coffee and he sits by me but at the next table. Him and L.C. engage in a conversation about somebody that owes Union dues. I get a break in there and I tell Mr. Soutier, "What are we going to do here?" And he says, "I'll handle it in a minute." Then they talk for three or four more minutes and I seen another break and I said, "You know, what are we going to do at my hearing here?" I said, "James Woolsey's a witness," I said, "We need to call him up." He goes, "We'll take care of it when we get in there, Karl", is what he said. I said, "Okay."

*** (TR beginning at page 164 line 11) ***

Q. All right. Does Woolsey's name come up in the conversation?

A. Yes, it does.

Q. When you lay out the events?

A. I told him that Woolsey was a witness.

Q. Does Mr. Soutier at any time during that hearing before it ends say let's hold on and let's get Woolsey up here?

A. No, he hasn't even got a pen with him.

MR. HAMMOND: It's not responsive to the question, Your Honor.

Q. (BY MR BAGSBY:) Does he ever request that Woolsey come up?

A. No.

Q. Does Mr. Barutio ask for Woolsey to come up?

A. No.

Q. Does Mr. Monihan ask for Mr. Woolsey to come up?

A. No.

Q. How far way is Mr. Woolsey from where this meeting is happening?

A. Walking, I'd say two, three minutes.

*** (TR beginning at page 165 line 20) ***

Q. What's discussed when you're in the room alone then?

A. As soon as they leave Soutier turns around to me and says what the F --

Q. Tell them exactly what he said, what exactly did he say?

A. He said, "What the fuck are you trying to do?" And I told him, "What do you mean?" He said, "Just come up with this bullshit story that you didn't know where it was and you tried to find it but you couldn't find it." I said, "That's what happened." He said, "Do you want your job back?" I said, "Yeah, I want my job back." He said, "Tell them this, tell them you're sorry for what you did, it was your fault, and please give me my job back." Then I told Mr. Soutier that if he doesn't help me, I'll find ways to get help after this hearing is over. He just told me, "That's fine, I'm just trying to tell you how to get your job back." And then he told me that he appreciates my response.

Q. Is that the extent of the conversation

A. That was it and yeah, that was it.

Q. And did the company officials come back in?

A. Thirty seconds later.

Q. All of them?

A. All of them?

Q. What happens when they come back in?

A. They say does anybody have any further comments and I told them I did. They said go ahead, and that was Barutio that said that. And I said, "I'd like to tell you gust that I'm sorry for any inconvenience that I caused because you misread my grievance form in the original form." And I said, but I explained a great deal that I was sorry that they misunderstood it.

*** (TR beginning at page 202 line 24) ***

Q. (BY MR. BAGSBY:) Karl, let's go back to your intent to contact someone within District 9 about the status of your grievance hearing.

A. Yes.

Q. You had written a letter; is that correct?

A. Yes.

Q. Regarding what is the status; is that correct?

A. Yes, sir.

Q. Now, you have in front of you Plaintiff's Exhibit 10; is that right?

A. Yes, sir.

Q. Is there a one page letter in there addressed to

someone requesting that you find out about the status of that hearing?

A. Yes, there is.

Q. And is that addressed to Mr. Bagwell?

A. Yes, it is.

Q. Now, could you go to the one page letter, and it's addressed to Mr. Bagwell, all right?

A. Yes.

Q. And I first want you to tell the jury who Mr. Bagwell is.

A. He's the President of the International Association of Machinists, Mr. Soutier's boss.

Q. And is that the letter that you wrote to Mr. Bagwell?

A. Yes.

TRANSCRIPT VOLUME 3

*** (TR beginning at page 47 line 12) ***
Testimony of Karl Roberts (Plaintiff)

Q. As a matter of fact, you testified on Direct Examination that when you were having this problem with Graves' disease you were having to use the rest room 20 to 30 times a day?

A. Yes, sir.

Q. And you make no contention in this lawsuit that the company prevented you from exercising the privilege of going to the bathroom 20 or 30 times?

A. Yes, he did. Dennis Blake did question it.

Q. Did you ever testify to that fact during the course of your deposition in October of 1994?

*** (TR beginning at page 50 line 1) ***

Q. As I understand it, sir, your inability to work in the paint department had nothing to do with your Graves' condition; is that right?

A. I thought it was my burns but when I think about it I think it was my Graves' because I worked in those plastic suites before. As a matter of fact, for six years I used to wear the same type of suits and they never bothered me. I think it was because my heart was beating so fast and it was wearing me out fast.

*** (TR beginning at page 64 line 2) ***

Q. What is the basis, Mr. Roberts, the facts that you have to support your claim that National Vendors perceived you as HIV positive?

A. The liability, the expression on his face when I told him that I had bad blood, the time he sent me home when my eyes were burning and I was on the verge of a heart attack, skin and bones. He wanted to know what was wrong with me. I let him know right away. And the general talk of the weld shop rupors do get to supervisors about what people have and National Vendors and Patrick Brown was one of the biggest gossipers in there.

*** (TR beginning at page 102 line 6) ***

Q. During the course of that day, sir, during the regular workday, at any time did you do what your supervisor told you and throw away a spool?

A. I wasn't in that work area in the morning hours, sir.

Q. I didn't ask you that. I'm asking you did you do what your supervisor told you --

A. I'm not allowed to leave my work area to go over there. But to be quite frank, I forgot anyway.

*** (TR beginning at page 147 line 18) ***

Q. Now, when you start your job on October 6th, did you start that morning's eight hour shift in the same place you were October 5th?

A. No.

Q. And Dennis Blake asks you to work overtime; is that right?

A. Yes, he did.

Q. And did you find it peculiar that he put you back into this same position, the same work station you were the day before?

MR. LINIHAN: Objection, Your Honor. I object to his state of mind about peculiarity. Besides, it's irrelevant.

MR. HAMMOND: I would object on that ground, Your Honor, plus it was earlier asserted that this does seem to

very much pattern the Direct Examination. I believe all these questions have been asked earlier.

THE COURT: Well, I think a number of these questions came up during the Cross-Examination. I'll overrule the objection.

Q. (BY MR. BAGSBY:) Did you find it peculiar that you got moved to the exact same station that you were at the day before?

A. Yes.

Q. Was there a welder at that station on October 6th for the eight hour shift before you got there?

A. Yes. There was Jeff Cutler that was welding on that line before I got there and right where I was welding. And what Dennis should have done is he was on that line and he should have stayed right there where I got put. And he was moved to another job.

*** (TR beginning at page 152 line 22) ***
Testimony of Gary Inness (co-worker)

Q. Sir, would you tell the jury your full name, please?
A. Gary Michael Inness.
Q. Mr. Inness, where are you employed?
A. Crane National Vendors.
Q. How long have you been employed there?
A. 25 years.

*** (TR beginning at page 154 line 4) ***

Q. Could you describe to the jury what physical changes you saw?
A. He lost a great deal of weight, his eyes kind of bulged, his clothes didn't fit him properly at all. I kind of thought he was going to die. I didn't know what was wrong with him.

*** (TR beginning at page 156 line 1) ***

anything he says regarding the note incident will be hearsay.

THE COURT: He can testify as to what he has observed but there needs to be some foundation laid for the question.

Q. (BY MR. BAGSBY:) Have you ever observed in your 23 years a supervisor demanding to see a note or anything that an employee has written on his break time?

A. No.

Q. Have you ever heard of that?

A. No.

MR. BEGIAN: Objection, Your Honor, as to what he may or may not have heard.

THE COURT: I'll sustain that objection.

Q. (BY MR. BAGSBY:) Are you familiar with any plant rule that entitles a supervisor to see notes written on break time?

A. No.

Q. Anything in the Collective Bargaining Agreement?

A. Not that I know of, not that I'm aware of.

*** (TR beginning at page 160 line 23) ***

Q. Is there a company rule to pick up trash at the end of the day?

A. Yes, there is. You're allowed five minutes from the last five minutes of the day to clean up your area.

Q. Did you find, under the circumstances, that to be a peculiar order to pick up that spool, to stop production?

MR. BEGIAN: Objection, Your Honor. It's a mischaracterization and his conclusion as to the priority of the order.

THE COURT: I'm going to sustain the objection.

Q. (BY MR. BAGSBY:) Are you aware, sir, of any incident as long as you've been employed at Crane where either you or a co-worker have been asked to stop production

and pick up a piece of trash?

A. Not to my knowledge, no.

*** (TR beginning at page 186 line 18) ***

Q. Does picking up trash fall behind production in priority?

A. Yes.

Q. That's something that can be done at the end of the day?

A. Yes.

*** (TR beginning at page 199 line 18) ***
Testimony of John Ray (co-worker)

Q. Was L.C. Monihan in close proximity to Patrick Brown when the statement was made?

A. Yes.

Q. Do you recall specifically what Karl looked like in his last year?

A. He had lost a lot of weight, he looked pale, he looked sick.

*** (TR beginning at page 213 line 3) ***

Q. Mr. Ray, my name is Cary Hammond and I represent District 9. Mr. Ray, I want to direct your attention to the second of the remarks that you attribute to Patrick Brown. And I believe it's your testimony that L.C. Monihan was present when the second remark was made?

A. Yes.

Q. Who else was present?

A. Let's see.

Q. Do you remember?

A. Honestly, I just remember the three of us or four; Karl, Patrick Brown, L.C. Monihan, and myself in the immediate work area.

Q. And Mr. Monihan was actually working at the time, wasn't he?

A. All of us were.

Q. Did you ever talk to Mr. Monihan about that incident?

A. No.

Q. So you don't know for sure that he heard it, do you?

A. He laughed pretty hard, yes, I know he heard it.

*** (TR beginning at page 217 line 17) ***
Testimony of Ken Garner (co-worker)

Q. (BY MR. BAGSBY:) Mr. Garner, I'm going to repeat the question. Have you seen on television a person who in real life had the AIDS virus?

A. Yes, I have, probably the most famous was Rock Hudson.

Q. Was the physical appearance of Karl Roberts in 1992 consistent with that appearance?

A. Yes, it was. You could tell the apparent weight loss and gaunty looking and he looked sickly like Rock Hudson.

Q. Okay. Let me ask you this: Do you know a co-worker in the weld department by the name of Patrick Brown?

A. Yes, I do.

Q. Did Patrick Brown ever make a statement to you that Karl Roberts had the AIDS virus?

A. Patrick come up to me one day at my work station and said I think Karl is sick, I think he might have AIDS.

Q. When he said that, was he joking to you?

A. No, he had a serious look on his face, he was not joking, he was not laughing.

*** (TR beginning at page 235 LINE 6) ***
Testimony of James Woolsey (co-worker)

Q. Specifically, in that year do you recall Karl Roberts' physical appearance changing in any way?

A. Yes.

Q. Could you describe to the jury what the physical change was?

A. Face drawn in, lost weight, eyes kind of bugged out, you know, kind of like a goggled-eye fish, kind of bugged out.

*** (TR beginning at page 236 line 8) ***

Q. Okay. Now, I'm going to draw your attention to October 5th, 1992 when a Dennis Blake requests Karl to pick up a spool; do you recall that?

A. Uh-huh.

Q. You recall the spool incident?

A. Yes.

Q. Were you there both days?

A. Yes.

Q. On the first day, could you tell me what Karl was doing when Dennis Blake approaches him and starts commenting on the spool?

A. The first day?

Q. Yes. Could you stay forward though because I think we're going to lose you on the mic.

A. Okay. He asked the man to pick the spool up and I believe he said, I didn't throw it there.

Q. Okay.

A. And I believe Dennis said, well, why don't we pick it up anyway, or something to that effect and we were working I know, and let's see, then Dennis left.

Q. Okay. Do you specifically recall Dennis Blake ever making any statement on that first day, this is a direct order, pick up the spool?

A. The first day?

Q. Yes.

A. No, I sure don't.

Q. Did you hear Mr. Blake state where the spool was located that first day?

A. Don't remember, no.

Q. Did you see him point to where the spool was located the first day?

A. No.

Q. Now, do you have a five minute departmental clean-up at the end of each day?

A. Exactly.

Q. What's that for?

A. It's to clean up your department and your personal self.

Q. And basically to pick up trash?

A. Trash, clean and sweep up around your work area, and personal hygiene, your hands or your face, whatever.

*** (TR beginning at page 239 line 8) ***

Q. Okay. Now after he left, did you and Karl attempt to find this spool?

A. I attempted to find it so I could throw it away so it would be no problem and he could keep welding and maybe I could try to work in finding the spool to throw it away while in between setting up fixtures.

Q. You were doing that so Karl could keep working?

A. Right, so there wouldn't be no problems, nobody getting into any trouble.

Q. When you looked for the spool, do you recall where you looked for the spool?

A. All over down there on that side where it was supposed to be at.

Q. Had a spool been laid out in the open floor, do you think you would have seen it?

A. Yeah, I think so, around the work area anyway.

Q. Did you locate any spools laying in the open?

A. Yeah, eventually did, yes.

Q. Was it in the open?

MR. BEGIAN: Objection, Your Honor, asked and answered.

THE COURT: I'll overrule the objection.

Q. (BY MR. BAGSBY:) Was the spool you located in the open?

A. No.

Q. Where was the spool?

A. It was and it wasn't. There was a four poster and there was some steel parts across it that were being used on the line and when they used enough parts, till they got down to that part, then you could see the spool because the thing became empty.

*** (TR beginning at page 241 line 1) ***

Q. Does Karl stop and does he look with you?

A. I' don't remember him -- yeah, he did stop but that was just right, it was all bang, bang, bang, right as they were coming over.

Q. Was he just getting caught up?

A. I can't remember if we had gotten caught up or not.

Q. Okay.

A. I don't think we had gotten caught up because it was a short period of time.

Q. Do you specifically recall Karl looking for the spool?

A. I remember him coming off the platform, yeah, and I showed him where the spool was at. I said it's right there and just as we stepped back up on the platform here everybody was coming.

Q. Was there any time, at that point when you say everybody was coming --

A. I see Ronnie Wilson and I see L.C. and I see my boss, you know, and I wanted to run over and get it but I'm thinking somebody is going to think I did this on purpose if I go over

and get this thing, somebody is going to think I'm doing something funny.

*** (TR beginning at page 243 line 12) ***

Q. Do you get docked in the weld department for not making what's called a rate?

A. You don't get docked but they would write you up.

*** (TR beginning at page 244 line 17) ***

Q. (BY MR. BAGSBY:) Were you able to witness whether or not Karl was able to completely explain what was going on?

A. Yes.

Q. Was Karl able to completely explain what was happening?

A. No.

Q. After Karl is escorted from the Crane property, were you ever approached by L.C. Monihan for the purpose of giving statement about the events of October 5th and October 6th?

A. No.

Q. Were you ever approached by Mr. Barutio -- I'm sorry, Robert Soutier from the Union about giving a statement to the events on October 5th and October 6th?

A. No.

Q. Did Ewin Barutio come down and talk to you about

the events on October 5th and October 6th?

A. No.

*** (TR beginning at page 266 line 22) ***
Testimony of Marvin Mullen (co-worker)

Q. (BY MR. BAGSBY:) Do you know where the spool was found?

A. Yes, it was under a skid or a four poster.

Q. That particular spool, do you recall seeing that spool there over a given period of time?

A. Yes, I did.

Q. Could you tell the jury approximately how long that spool had been laying near that area?

A. I'd say approximately two weeks.

Q. All right. Was there a number of co-workers or welders that worked at the station during that two week period?

A. I worked there, Karl worked there, I think there was one more worked in there, in the same area.

Q. How about, do you know of anybody named Jeff Cutler?

A. Yes.

Q. Was he a welder?

A. He's a welder.

Q. Did you -- you know, I take it, about the demand to pick up this spool; is that right?

A. Yes.

Q. You've been there how long again?

A. 31 years.

Q. In reflection of these 31 years, did you find it peculiar that Dennis Blake had given a direct order to Karl Roberts to pick up that spool ?

A. Yes, I did.

Q. Why?

A. Because it had been laying there too long and too may of us work by it.

*** (TR beginning at page 268 line 19) ***

Q. (BY MR. BAGSBY:) Have you ever in your 31 years had such a request that was made of Karl Roberts to stop your production?

A. No.

*** (TR beginning at page 276 line 11) ***

Q. Mr. Mullen, you had stated to Mr. Begian you have no evidence or no facts that the company perceived Karl to be HIV positive?

A. That's correct.

Q. However, you do believe that the incident over the spool was a setup, didn't you?

A. Yes, sir.

TRANSCRIPT VOLUME 4

*** (TR beginning at page 12 line 4) ***
Testimony of Edward Lynch, M.D. (Plaintiff's physician)

Q. And, sir, could you tell the jury what are the classic sings of Graves' Disease?

A. The classic signs are diffuse generalized enlargement of your thyroid or goiter along with weight loss, tremor, fast heart rate or palpations, history of diarrhea, history of itching. Sometimes the patients will have eyes that are bulging and that's a classic sign of Graves' Disease or hyperthyroidism.

*** (TR beginning at page 16 line 17) ***

Q. Dr. Lynch, going back to Graves' Disease itself, what causes that?

A. Graves' Disease cause is unknown. It's a hyperfunctioning of the thyroid gland that occurs in many. It's a fairly common disease that we see.

Q. Is it a treatable disease?

A. It's a very treatable disease.

Q. If it's not treated, what can happen with the disease?

A. Well, your thyroid is overactive. Your heart rate is speeding up. You're losing weight.

MR. BEGIAN: He's again offering expert testimony in this issue.

THE COURT: The objection is overruled.

Q. If left untreated what would happen specifically in Karl Robert's case based upon what you observed?

A. Well, he would have kept on losing weight. If symptoms would have kept getting worse. He would have been more tired and run down. He would have developed other complications such as the eye disease that can lead to blindness. If he had nay kind of heart disease which he may have had or may have because he was a smoker, that could lead to a heart attack, if your thyroid is overactive for any length of time. His was caught at a fairly early stage.

Q. Following up, though, if left untreated, it could cause death?

A. It could cause death, yes.

*** (TR beginning at page 46 line 1) ***
Testimony of Wes Kelley (co-worker)

Q. Do you recall who your supervisor was in 1992?

A. George Herman.

Q. Is there a position known as a group leader in the paint department?

A. Yes, yes, there is.

Q. And did you see what the group leader would do as far as his duties?

A. He would take orders from the supervisor, George Herman. He would relay them to the painters, kind of like an assistant and relay that order to us and tell us what to do.

Q. All right. In the year 1992, did the group leader at that time ever warn you about a physical --

MR. BEGIAN: Objection, Your Honor, leading the witness.

THE COURT: I'll sustain the objection.

Q. Who was the group leader in 192?

A. Mike Branscum.

Q. And did Mr. Branscum ever make a statement to you that Karl Roberts may have --

MR. BEGIAN: Objection, Your Honor, he's leading the witness.

Q. Are you aware of any statements in the year 1992 regarding Karl Roberts having the Aids virus?

MR. BEGIAN: Objection, Your Honor.

THE COURT: Okay. Let's just answer the question.

THE WITNESS: Yes.

Q. Who made the statement to you?

A. Mike Branscum.

Q. Where did he make the statement to you at?

A. In the paint shop.

Q. Was the tone of his statement serious or jokingly?

A. It was serious.

Q. Could you tell the jury to the best of your recollection what was his statement he told you?

A. On a particular day Karl Roberts and I were painting on the paint line. Karl was using by fresh air hood. It's a hood you put over your head so you won't breathe paint fumes and et cetera, and I was using a respirator which is a mask that you put on your face. I got relieved. Somebody relieved me for my break and I went to Mike Branscum who was turning cabinets, sanding them in the middle of the aisle, and I asked Mike if he had another helmet that I could make up another fresh air hood because Karl was using mine because he didn't have one. I asked him that because --

MR. BEGIAN: I'm going to object. This is not responsive to the question.

THE COURT: Let's put it in question and answer form.

Q. Were you explaining to them how the statement comes out?

A. Right, I'm explaining how it came about.

Q. And is this right before the statement?

A. Right before the statement.

Q. Could you go ahead and tell the jury how the statement comes out?

A. Okay. I told Mike I needed a helmet because I didn't want to be using a helmet with anybody else because it spreads germs and people sneeze and they cough in them, et cetera, and Mike made a statement to me saying you better not mix your respirator up with Karl's because he could have Aids and then he paused or something.

Q. Did you see Karl Roberts in the year 1992 when he was in the paint department?

A. Yes, I did.

Q. Did you see him on a daily basis?

A. Yes.

Q. Did he appear ill to you at all?

A. Yes, very ill.

Q. Could you describe to the jury what the physical symptoms were, signs that you saw?

A. He was extremely skinny like a person would be if they were anorexic.

MR. BEGIAN: Objection, Your Honor, as to the analogy.

THE COURT: Just describe his physical character.

THE WITNESS: He was very skinny. His face was sunken into -- like really skinny. He had no build on his face. His eyes were sunken in and dark. He just looked really sick like a real sick person I guess.

*** (TR beginning at page 54 line 22) ***

Q. The truth is you told no company representative of this alleged comment?

A. No reason to.

Q. No reason to. You didn't believe it, did you?

A. I did believe it.

Q. You did believe it?

A. Yes.

Q. Did you act on your belief in any way?

A. I absolutely did.

Q. But you never told any company representative about it?

A. No.

Q. And you simply didn't use the respirator of Mr. Roberts, right?

A. The respirator?

Q. The respirator.

A. No, I didn't use his respirator.

*** (TR beginning at page 84 line 7) ***
Testimony of L.C. Monehan (chief shop steward)

Q. Sir, in the 26 years or 28 years, I'm sorry, that you've been at Crane, can you think of one incident, one, where an employee was fired over a single act of insubordination?

*** (TR beginning at page 84 line 16) ***

Q. Sir, can you think of one?
A. No.

*** (TR beginning at page 87 line 18) ***

Q. Sir, do you recall when I asked you what you recalled his physical description to be in your deposition?
A. Yes.
Q. Do you recall what your answer was?
A. I think what I told you that what I had seen on a person that would been ill in the effect of HIV virus that it was someone real skinny and dried up like you see on TV.
Q. In the 32 years that you've been employed at Crane, had you ever up to that point heard of an incident where a supervisor demanded to see something that an employee had written on his break time?
A. No, sir.

*** (TR beginning at page 94 line 8) ***

Q. Okay. Did you meet Karl Roberts on the day of his step three grievance hearing in the lunch room?

A. Yes, sir.

Q. Do you recall overhearing Mr. Roberts tell Mr. Soutier that he wants Mr. Woolsey there?

A. No, sir, I didn't.

Q. Sir, do you recall from your deposition, page 73, do you recall the following question being asked to you, "You said before in response to one of Mr. Perkin's questions" and that was the attorney from the union, "that Karl did make a request to Bob Soutier of witnesses where they were discussing witnesses and Karl is the one who brought that subject up; is tat correct?" And your answer, "Yes, sir."

A. Yes, sir, did say that, yes, sir.

*** (TR beginning at page 96 line 2) ***

Q. You certainly had the opportunity to talk to and take a statement from Mr. Woolsey, didn't you?

A. I would have if he would have come forward, yes, sir.

Q. If who would have come forward?

A. Mr. Woolsey. See he never mentioned no witness or he told me that nobody said anything that they had seen anything.

Q. So you specifically let me ask this. Did you ask Mr. Woolsey if he saw anything?

A. No, sir.

Q. Did you ask Gary Inness if he saw anything?

A. The only thing I asked Mr. --

Q. Sir, did you ask Mr. Inness if he was anything?

MR. HAMMOND: I'd like to have the witness have the opportunity to answer the question, Your Honor.

MR. BAGSBY: He's being non-responsive.

THE COURT: Yes, all right. Sir, try to answer the question directly and the other attorneys will have an opportunity to expand upon the answer to the question.

THE WITNESS: No, sir.

Q. Did you speak to Mr. Mullen?

A. I don't recall the name.

Q. In the 32 years that you've been there, are you aware of any incident where an employee was fired for a single act of insubordination?

MR. HAMMOND: Object to the form of the question.

MR. BEGIAN: And It assumes facts not in evidence in this case.

THE COURT: He can answer if he knows.

THE WITNESS: No, sir.

*** (TR beginning at page 110 line 2) ***
Testimony of Robert Soutier (Business Representative)

Q. Did you advise Mr. Monehan ahead of time before the grievance hearing to cover the witnesses if there are any?

A. No, sir.

Q. Did you yourself go out and investigate in the plant or speak to any witnesses regarding Karl Robert specific grievance?

A. No, sir.

Q. Would you agree, sir, that in a step three grievance hearing it could be tremendously helpful to have someone corroborate a grievance?

A. It could be helpful.

Q. You did not speak at all by phone, by letter or correspondence to Mr. Roberts before the grievance hearing, did you?

A. I can't be certain of that. I believe I did.

Q. All right. At any time did you advise Mr. Roberts that he needs to schedule an appointment so we can discuss the grievance?

A. With me personally?

Q. Yes.

A. No, sir, I did not.

Q. All right. Did you have Mr. Monehan make any such arrangement?

A. No, sir, I did not.

Q. And you were aware that he had already been terminated; is that right?

A. Yes.

Q. So the step three grievance hearing that is now going to happen is essentially your last chance, is that right, that you can get involved in?

A. No.

Q. Aside from arbitration?

A. Aside from arbitration, that's correct.

Q. That's going to be a much more complex, costly experience, isn't it?

A. Yes.

Q. And the purpose of the step three grievance hearing is to avoid the chance of a avoiding an arbitration, isn't it, to see if we can get it resolved at that level?

A. Certainly if you can resolve it at the third step there would be no need for arbitration.

Q. Even before you get to the third step, there's a step one, step two chance as to resolve it; isn't it correct, in discharge cases, in any case?

A. In any case you can have a step one or two, yes, sir.

Q. Now, as a business representative, does the grievant have to present his grievance through you? Does he have to rely on you?

A. Yes, sir.

Q. He's not entitled to go through a step three grievance hearing by himself, is he?

A. No, he's not.

Q. He has to have the assistance of a business representative?

A. That's correct.

Q. And basically you've got a duty to represent him?

A. Absolutely.

Q. And a part of that duty, the union made sure that you would have access under the labor agreement to company grounds to search for witnesses any time; isn't that correct?

A. I don't believe I've ever been denied access.

Q. You understand your labor agreement makes very specific assurance that you're entitled to get on company grounds and inspect those company grounds and talk to witnesses?

A. I believe it does.

Q. Do you believe it does or it does?

A. I'm certain that it does.

Q. Do you recall meeting Mr. Roberts in the lunch room prior to his step three grievance hearing?

A. Yes, I do.

Q. Do you recall Mr. Roberts telling you that he would like Mr. W olsey up there?

A. No, I don't.

Q. Never heard that?

A. Never heard that.

Q. Do you recall Karl Roberts giving his account of the events in the grievance hearing itself?

A. Yes, I do.

Q. At that time, do you recall the names of coworkers

coming up?

A. No, sir.

Q. Did you ask Mr. Roberts when he gives his accounts, were there any bystanders to observe this or hear the statements of Dennis Blake?

A. No, sir.

Q. Do you have the opportunity if you get to a step three grievance hearing in a grievance laying out his account of the events to stop the proceedings and go summon witnesses?

A. I believe I would have that right, yes, sir.

Q. Now, you've called witnesses in step three hearings before, haven't you?

A. I'm certain I have.

Q. And you did not for Mr. Roberts?

A. Did not for Mr. Roberts.

*** (TR beginning at page 129 line 8) ***
Testimony of Dennis Blake (Plaintiff's supervisor)

Q. Sir, did you hear the question that I asked? Did you know what Graves' Disease was?

A. No, sir.

Q. Did you ever ask Karl to supply you with any document at all as to what Graves' Disease was?

A. No, sir.

Q. In fact, you never saw any verification whatsoever that Karl actually had Graves' Disease, did you?

A. Not to my knowledge, no.

*** (TR beginning at page 130 line 1) ***

Q. Did you notice a sunken face at all?

A. No.

Q. Any protruding eyes?

A. Like I said before, he had something wrong with his eyes. I thought it might be pink eye and I told him if it was bothering him to go to the doctor.

Q. Did you notice bulging eyes, sir?

A. No, sir.

Q. And you saw Karl Roberts on a daily basis?

A. Yes, sir.

Q. And you noticed none of those symptoms that I just described.

A. No, sir.

*** (TR beginning at page 131 line 6) ***

Q. Did you tell anyone that you were going to put that in the file of Karl Roberts?

A. I don't recall.

Q. Does it reflect that a cc copy was given to Karl Roberts?

A. No, it doesn't.

Q. How about the chief shop steward, L.C. Monehan?

A. No, it doesn't.

Q. You're aware that at that point it went into the file, and if a copy had bee cc'd, Karl Roberts would have had the opportunity to grieve what you had filed?

A. I never thought of it before.

Q. You didn't think of that at all?

A. No, sir.

*** (TR beginning at page 133 line 9) ***

Q. Do you recall citing Karl Roberts in any way for insubordination on October 5th?

A. No.

Q. Was he insubordinate to you on October 5th?

A. No, he was not.

*** (TR beginning at page 146 line 5) ***
Testimony of Edwin Barutio (V.P. Human Resources)

Q. Looking at Plaintiff's Exhibit Number 22, does that appear to be the interrogatory which requested to list the employees that were discharged over a five-year period?

A. Yes.

Q. And last year going backwards is the same year that Karl Roberts was discharged; is that right?

A. Yes.

Q. In support of that, there was a request of production of documents for you to provide listing the reasons why employees were discharged; is that right?

A. Yes.

MR. BAGSBY: Your Honor, may I approach the witness?

THE COURT: Yes.

Q. Now, you have in front of you Plaintiff's Exhibit 24. Does that appear to be the documents that were provided under the production of documents request of employees who were discharged?

A. It appears to be, yes.

Q. And you had given a deposition in this case; is that right?

A. Yes.

Q. And we had gone through and you were asked to respond to the question of listing the reason why each one

was discharged; is that right?

A. That is correct.

Q. Do you recall from that without -- hopefully we won't have to, how many employees from this list were discharged for the reason of insubordination?

A. I don't recall that.

Q. I guess we'll have to do it then. Could you go to Exhibit Number 24A, Mr. Alexander?

A. Okay.

Q. What was the reason Mr. Alexander was discharged?

A. That was a Miss Alexander and it was absenteeism.

Q. Okay. Would you look at 24B and could you tell us who that is?

A. Mr. Blanks.

Q. What was the reason he was discharged?

A. He didn't comply with the leave of absence clause in the contract.

Q. 24C, could you go to that employee and who is that?

A. Mr. Bowens.

Q. What was the reason Mr. Bowens was discharged?

A. I really don't say in my letter. We just say the suspension was changed to a termination. I would assume it was insubordination.

Q. There should be a narrative report?

A. There is a narrative report for insubordination.

MR. BAGSBY: Your Honor, I'd like to be able to mark on my exhibit, just circle Exhibit Number 18.

Q. Could you go to the next employee?

A. Robert Carroll, that was production interference.

Q. The next employee?

A. Christenson.

Q. And the reason he was fired?

A. He was fired under the attendance control program, absenteeism.

Q. Okay.

A. And Mr. Colyer would be next.

Q. Is that Plaintiff's 24F.

A. 24F.

Q. And the reason he was discharged?

A. Excessive absenteeism.

Q. Go ahead Plaintiff's 24G.

A. R. Cook would be next, absenteeism also. Mr. Criley is production interference. Mr. Davis reported for work in an unsafe condition. Mr. Dobbs, possession of an alcoholic beverage on company property. Mr. Domijan, falsification of public records. Mr. gray, submitted a false doctor's statement. Mr. Hays, excessive absenteeism. Mr. Irving, production interference. Mr. Mahone, attendance. Mr. Mahoney, this says attendance record is attached so I have to assume that is attendance also. Mr. Malone excessive absenteeism. Mr. McFadden, is production interference. Mr. Nathan, violation of the substance abuse policy. Mr. Petran, reporting to work in an unsafe condition. Mr. Power, attendance control program. Mr. Rance, altercation with another employee. Mr. Shea, the status noted is checked poor under attendance. I would assume that's under attendance. Mr. Slack,

falsification of company records. Mr. Vasser, attendance control program. Mr. Williams, excessive absenteeism and Mr. Wells, excessive absenteeism.

Q. Okay. Looking at Plaintiff's Exhibit Number 12 then and responding to the question of how many employees were discharged for their stated purpose being insubordination, how many names up there do you see that reflect that?

A. Apparently one.

*** (TR beginning at page 151 line 1) ***

Q. You also produced again the records that pertain to these acts of insubordination; is that right?

A. Yes.

MR. BAGSBY: Your Honor, may I approach the witness?

THE COURT: Yes.

Q. You have in front of you Plaintiff's Exhibit 23; is that correct?

A. Yes.

Q. And could you look through that stack and does that appear to be in fact the documents that you produced?

A. Yes. They appear to be the documents that were produced.

Q. Okay. Could you go to Plaintiff's -- what's in front of you would be 23B Clarence Bowens?

A. All right.

Q. Okay. Do you see a document in front of you that is

dated February 29th, 1988 -- no, I'm sorry. Do you have a document dated April 21st, 1988?

A. Yes.

Q. And does that document reflect that Clarence Bowens was cited for Plant Rule 18 which is insubordination?

A. Yes.

Q. Does the narrative reflect that Mr. Bowens was using abusive language towards his supervisor?

A. Yes.

Q. And does that document reflect that his discipline was simply receiving a written reprimand?

A. Yes, it does.

Q. And that's on April 21st, 1988?

A. Yes.

Q. Could you turn to the next page and do you see a narrative report dated April 19, 1988?

A. Yes.

Q. Could you go to the bottom of paragraph two where the sentence that begins, "Clarence said fuck a reprimand." I repeated myself and he said, "Fuck a reprimand and you too," does it say that?

A. Yes.

Q. Is that a document that was submitted by Dennis-Blake?

A. Yes, it is.

Q. Going back to the front page, is that a document, the written reprimand was that issued by Dennis Blake?

A. Dennis signed the reprimand, yes.

Q. Could you go to the third document of Clarence Bowens which is of poor quality but in the right-hand corner you should see a received stamp that's dated August 17, 1988?

A. Yes.

Q. And Dennis Blake, do you see his signature at the bottom?

A. Yes.

Q. And from what you can read of this, is it a violation of plant rule and appears to be number four?

A. Yes.

Q. The document itself, can you read anything else on it as far as the narrative text of it?

A. It looks like on Friday, August the 12th employee worked four hours and then it gets blurred and something for the four-hour period was eight units short of a standard.

Q. Okay. Now, let's go to the document right behind that one and does that appear to be a narrative report?

A. Yes.

Q. And is it dated August 19, 1988?

A. Yes.

Q. Could you go to what is the third and fourth line sentence that begins, "Gary indicated," do you see that?

A. Yes.

Q. Does that document reflect, "It says Gary indicated Clarence said I wish I had you in the back alley because you're not so tough. Dennis replied he is not going to argue with Clarence." Does it later on reflect that this is a -- in the second paragraph he was given a layoff for insubordination in

the next paragraph?

A. That's what the memo says, yes.

Q. And it's a two-day disciplinary day off?

A. Yes.

Q. Would you agree that the gist of it is that he offered to take the supervisor out in the back alley to beat him up?

A. It could be interpreted that way, yes.

Q. That one is dated August 19, 1988?

A. Yes.

Q. Could you go to the next document. Do you see one that's dated August 23rd, 1988?

A. Yes.

Q. And does that document reflect that Mr. Bowens was cited for violation of plant rule 18 insubordination?

A. Yes.

Q. Does that reflect that he was given a two-day disciplinary layoff?

A. Yes.

Q. Could you go to the next document. It should be dated October 19, 1988?

A. Yes.

Q. And does that document reflect that he's given another reprimand to what appears to be violation of Plant Rule 27 production?

A. Yes.

Q. And his punishment was a written reprimand?

A. That's correct.

Q. Could you go to the next document and by the way

these have all been on Clarence Bowens, haven't they?

A. Yes.

Q. The next document appear to be dated February 21st, 1990; is that right?

A. Yes.

Q. And he is being cited for needless waste of company time; is that right?

A. That's correct.

Q. And does it appear that his punishment was a verbal reprimand?

A. Yes.

Q. Let's go to the next document as dated February 23rd, 1990. Does that document appear to reflect that Mr. Bowens is being cited for violation of plant rule 18 insubordination and plant rule threatening a supervisor?

A. Yes.

Q. And this is down in the text that he threatens to kill Mr. Blake?

A. I wouldn't interpret it that he threatened to kill Mr. Blake. He said he later approached the supervisor and made reference to a former supervisor who met a violent death and stated in part the same thing could happen to you. That particular supervisor committed suicide I believe.

Q. You don't take this to be a threat of death though?

A. It wasn't a direct threat of death to the supervisor or we would have handled it differently. I remember the incident.

Q. And is this a reprimand that's issued by Dennis Blake?

A. Yes.

Q. And his punishment was a two-day disciplinary layoff?

A. That's correct.

Q. Could you go to the next document that's dated May 15, 1990?

A. Yes.

Q. And I tell you what, to refresh your recollection this is a vague memo. Could you read that to yourself briefly?

A. All right.

Q. Does that appear that he just in the narrative -- do you interpret that to be that he just walked off his work station?

A. Yes.

Q. And that's on May 15, 1990?

A. That's correct.

Q. Did he receive a reprimand or anything out of that incident?

A. On.

Q. Could you turn to the next document dated December 6, 1990. Just take a second to review that.

A. All right.

Q. Does that appear to be an incident of insubordination wherein Mr. Bowens again tells Dennis Blake I think the phrase here is I'm giving you this, is Clarence speaking. "I'm giving you a direct order. Get out of my mother fucking face," and then he continues to curse at Dennis?

A. That's correct.

Q. And he got suspended over that. That's November 6,

1990; is that correct?

A. Yes.

Q. And then there appears to be a document it should be the last one there dated November 8, 1990 and says he's terminated?

A. That is correct.

Q. I'm not going to go through each one of these, sir, but would you agree that there are employees in here who have been written up one, two, three, or four times and never been discharged for insubordination?

A. Yes.

*** (TR beginning at page 76 line 11) ***
Testimony of Dennis Blake (Plaintiff's supervisor)

Q. And again on the September 30th memo, you don't give Karl Roberts a copy then, do you?

A. No, sir.

Q. He doesn't even know that you prepared that and put that in his file, does he?

A. No, sir.

Q. Had he received a copy of it, he would have had an opportunity to file a grievance against it, wouldn't he?

A. He could file a grievance anytime he wants.

Q. How is he going to file a grievance if he doesn't even know that you are doing it?

MR. BEGIAN: Objection, Your Honor. It's argumentative.

THE COURT: I'll overrule the objection.

Q. (BY MR. BAGSBY:) How is he supposed to know?

A. I don't know.

Q. He's not going to know, is he?

A. Probably not.

Q. There is no way to know? Isn't that why you don't want to give him a copy so he can't aggrieve it?

A. The thought never entered my mind. It's my documentation of what happened that day.

*** (TR beginning at page 78 line 12) ***

Q. When you go over to try to seize the note from Karl, is he on a break?

A. I don't recall. I don't think so, no.

Q. Do you know any rule that would entitle you to see a note that he writes on his break time?

A. No, sir.

TRANSCRIPT VOLUME 6

*** (TR beginning at page 5 line 1) ***
Testimony of Edwin Barutio (V. P. Human Resources)

Q. Would you review again, sir, how long you have been employed by Crane National Vendors and what your position is with Crane National Vendors?
A. I was employed with another division of National Vendors in 1962 in August. Presently my position is vice president of Human Resources and I've held that position since approximately 1969.
Q. And would you describe briefly for the jury exactly what does National Vendors manufacture?
A. National Vendors manufactures vending machines, primarily food vending machines. We also do some contract manufacturing for the Postal Service. We manufacture coin mechanisms and build elevators.

*** (TR beginning at page 22 line 2) ***

Q. Now, as I understand it there was a third-step meeting conducted with respect to the Karl Roberts' grievance, correct?
A. That is correct.
Q. All right. What happened, sir, with respect to steps one and two?
A. We agreed, or I agreed with L.C. Monehan that we

would bypass steps one and two and refer the grievance directly to the third step.

*** (TR beginning at page 51 line 16) ***

Q. As long as we're on the subject, have you ever heard rumors of any employee at National Vendors being HIV positive or having AIDS?

A. Yes.

Q. Have you ever heard a rumor that Mr. Roberts was either HIV positive or had AIDS?

A. No.

*** (TR beginning at page 63 line 18) ***

Q. Mr. Baruffo, you've told the jury that you've heard rumors about an employee that is now, I take it, working for Crane; is that right, that has the AIDS virus?

A. Yes.

Q. So, are you telling the jury that there are rumors that occur out on the plant floor, that reach you as vice president of Human Resources Department?

A. Yes.

*** (TR beginning at page 73 line 6) ***

Q. Thank you, sir, you've answered the question. You have in front of you Plaintiff's Exhibit 23. That would be the

yellow document. And again, let's go back to incidents that occur within a given window of time. That was a major factor in your mind; is that right?

A. Yes.

Q. Let's go to Mr. McFadden, Plaintiff's Exhibit 23A. Do you have a document in front of you that's dated February 29, 1988?

A. Yes.

Q. And that's regarding Mr. McFadden?

A. Yes.

Q. And it's violation of shop rule 18?

A. That's correct.

Q. And on this occasion, Mr. McFadden used abusive language towards his supervisor and then ordered the supervisor out of his work area. Do you see that?

A. Yes.

Q. And the disciplinary action given for this occurrence was a written reprimand; is that right?

A. That's correct.

Q. And when you say "written reprimand," you're not even talking about a two-day suspension or disciplinary layoff, are you? You're just talking about, here's your punishment, it's a written reprimand?

A. Yes.

Q. Is there a document right behind that reflecting that four days earlier on February 25th 1988, Mr. McFadden was again insubordinate and this was prior to the incident we just talked about?

A. Says he became argumentative, yes.

Q. Does it reflect from Dennis Blake, that Dennis Blake tells Mr. McFadden to rework some cabinets and he absolutely refuses to do it. Blake repeats himself three times and he still refuses?

A. Yes.

Q. And then there doesn't appear to be any punishment whatsoever because of that incident, not even a verbal reprimand.

A. No, it was just documented.

Q. And those two incidents occurred within a four-day period of time; is that right?

A. That is correct.

Q. And would you agree those were challenges to Dennis Blake's authority, refusing to do what he told him and ordering him to get out of his work area?

A. Yes.

Q. And the worst he got was a written reprimand?

A. That is what we issued at the time, yes.

Q. Could you turn to 23D, Mr. Large? Do you have a document in front of you that's dated March 22, 1989?

A. Yes.

Q. And it's violations of plant rule number 18, insubordination, and plant rule 4, needless wast of company time; is that right?

A. Yes.

Q. Now, this one is dated March -- the event occurs on March 20th, 1989; is that right?

A. Yes, that's what it indicates.

Q. Okay. And on this incidence, Mr. Large quit working 25 minutes before the end of his shift, supervisor tells him to go back to work and he just doesn't do it; is that right?

A. That's what it sates, yes.

Q As a result of this he's given a two-day disciplinary layoff; is that correct?

A. Yes.

Q. Now, there is also indicated in this, that there were prior disciplinary acts; is that right?

A. Yeah.

Q. And there appears to be two more of the identical charges that occurred on April 29th, 1988; is that right?

A. That's correct.

Q. On the insubordination count he was given a verbal reprimand?

A. Yes.

Q. The year prior. On the other one he was given a written reprimand; is that right?

A. Yes.

Q. So, just looking at Mr. Large's file it appears that there is some kind of grading that goes on. Is that fair, that as somebody accumulates more insubordinations, the punishment gets worse?

A. We follow a system of progressive discipline, yes.

*** (TR beginning at page 76 line 23) ***

Q. Here you list two incidents from the year prior and the punishment was a verbal reprimand, a written reprimand and then in the following year he gets a two-day disciplinary layoff. That seems to contradict what you said, doesn't it?

A. Well, I believe that the date of this reprimand that was issued, even though the date of the occurrence was the 20th, reprimand was issued the 22nd. Those reprimands were still in effect. They were not in effect on the date of the occurrence granted.

Q. Well, sir, by looking at this document, aren't you taking into account what happens in the year earlier?

A. Well, this happened on April 29th of 1988, as far as the insubordination is concerned. This incident occurred on March 20th, 1989.

Q. Well, by listing the other two incidents on this document, the 1989 event, the 1989 insubordination, it looks like you are grading up, doesn't it, as far as punishment goes, and are you taking into account prior incidents?

A. Yes, we are.

Q. Okay. Let's go at the 23G, D. Gray. I believe the first document is going to be dated June 3rd, 1988; is that correct?

A. Yes.

Q. And this is not an insubordination. This is production interference and conduct towards fellow workers; is that right?

A. Yes.

Q. Also a violation of company rules?

A. Yes.

Q. And on this incident on June 3rd. 1988, it appears that Mr. Gray was spitting on co-workers?

A. That's what it indicates, yes.

Q. And for that he was given a verbal reprimand?

A. He actually was not spitting on co-workers. He was spitting on the equipment that the co-workers used.

Q. Okay. He was given a verbal reprimand for this; is that right?

A. Yes.

Q. And these were for events that occurred May 27th, 1988; is that right?

A. Yes.

Q. And then could you turn to the next page, document dated June 14, 1988, and that appears to be a reprimand for careless workmanship?

A. Yes.

Q. And on this occasion he gets a written reprimand; is that right?

A. Yes, different issue.

Q. Okay. Go to the next document. Does there appear to be a document dated June 6th, '88?

A. Yes.

Q. And that one reflects careless workmanship?

A. That's correct.

Q. And for that he gets a verbal reprimand?

A. Yes.

Q. Could you turn to a document dated August 22nd, 1988? It's another employee reprimand.

A. All right.

Q. And this is violation of plant rule 15, threats of physical violence, and does it reflect that the employee threatened a fellow employee with physical violence?

A. Yes, it does.

Q. And for this he was given a written reprimand?

A. Yes.

Q. Could you turn to the next document dated August 22nd, 1988?

A. All right.

Q. And that appears to be a reprimand for careless workmanship again; is that correct?

A. Yes.

Q. And down there you list the prior acts of workmanship; is that right?

A. Yes.

Q. So on this one he's given a two-day disciplinary layoff as punishment; is that right? and an act of insubordination and another act of safety violation?

A. Yes.

Q. So, now they're back-to-back days; is that correct?

A. That is correct.

Q. And for the first day, she received a verbal reprimand; is that correct?

A. Yes.

*** (TR beginning at page 87 line 3) ***
Testimony of Edwin Barutio (V. P. Human Resources)

Q. Violation of plant rule 18, insubordination?

A. Yes.

Q. And for this June 26th incident, Mr. Power received a written reprimand, just the document itself?

A. Yes.

Q. And does it reflect the prior incident of disciplinary action taken 12 days before?

A. Yes.

Q. And is that for insubordination?

A. Yes.

Q. And for that first insubordination, Mr. Power received a verbal reprimand?

A. That's correct.

Q. Okay. So, there are two incidents 12 days apart, correct?

A. Yeah.

Q. Let's go to 23N, K. Tucker. Should have a document dated December 8, 1989.

A. Yes.

Q. And that's violation of plant rule 18, insubordination, correct?

A. Yes.

*** (TR beginning at page 89 line 2) ***

A. Yes.

Q. And this is violation of plant rule 18, insubordination?

A. Yes.

Q. And in this incident Mr. Lewis just refused to go on a job that he was assigned to?

A. That's right.

Q. And for this he had received a two-day disciplinary layoff?

A. Yes.

Q. And prior to that on April 10th, the month before, he was written up for conduct towards fellow workers; is that correct?

A. Yes.

Q. And for that he was given a two-day disciplinary layoff, too?

A. That's correct.

Q. Let's go to 23U, Plaintiff's 23U. That would be Mr. Mahone. Is the first document you have dated August 22, 1988?

A. Yes.

Q. And that just simply lists insubordination?

A. Yes.

Q. And there is no explanation?

A. No, there is not.

Q. And for this he received a disciplinary layoff the remainder of the shift of the day he's cited and then apparently

two other days; is that correct?

A. That's correct.

Q. Okay. Could you turn to the document behind that which is dated August 15, 1988, a week earlier? Does that appear to be a document that is simply a memo for insubordination?

A. Yes.

Q. Okay. Doesn't even reflect a verbal reprimand, does it?

A. Well, that subject is suspension of Lester Mahone.

Q. Do you recall anything about the incident?

A. No, I don't.

Q. Could you go down into the middle of the paragraph, the third paragraph? There is a quote there that says Mahone said, "that's the way the paragraph begins."

A. Yes.

Q. Is this what that document says: I don't need you to come over here asking me about these motherfucking trays. Just told him, Lester, I feel I have the right to come over here, asking if you have a problem. Mahone said, get the fuck out my motherfucking face, I don't have to do a fucking thing you tell me; is that correct?

A. That is what it says.

Q. And that appears to be insubordination, doesn't it?

A. Yes.

Q. And that occurred one week before the August 22nd document?

MR. BEGIAN: Objection, Your Honor, that's a

mischaracterization of the exhibit. The prior document from which he read was the very date August 15, 16, and 17, which the second memo documents.

Q. The document that I just read from, is it dated August 15, 1988?

A. Yes, it is.

Q. The document in front of that, is it dated August 22, 1988?

A. Yes, but it also says disciplinary layoff for the remainder of the shift on August the 15th, 16th, and 17.

Q. Okay. But he's not terminated over this, is he?

A. No, he's not.

Q. Would you agree that that challenges supervisor authority?

A. Yes.

Q. Could you go to 23V, T. Little? And do you have a document dated September 14, 1988?

A. Yes.

Q. And this is where Mr. Little apparently punched the supervisor?

A. Apparently.

Q. Could you go to a document directly behind that, and that's dated June 26, 1991?

A. Yes.

Q. And is that a violation of plant rule 18, insubordination?

A. Yes.

Q. And for that he received a two-day disciplinary layoff;

is that correct?

A. Well, he received the remainder of the day off on June 25th and the entire day on June 26th. I can't say whether that was two full days or not.

Q. But he wasn't fired as a result of it, was he?

A. No.

Q. Let's go back up to L. Jennings, 23C. And that document itself is very difficult to see, isn't it?

A. Yes.

Q. Can you read the date up there in the left corner, April 29th, '88?

A. Yes.

THE COURT: What's the number on this one?

MR. BAGSBY: This is 23C, L. Jennings.

Q. (By Mr. Bagsby) And this is a verbal reprimand for insubordination; is that correct?

A. Yes.

Q. Okay. Now, let's go down to 23E, K. Barnett. I'm sorry, looking at Mr. Jennings's there real quickly. Is that the only document in there?

A. Yes.

Q. Okay. Now moving down to Barnett. Does that appear to be a document dated May 27, '88?

A. I'm sorry, where did you go?

Q. Upper left corner --

A. What exhibit are we talking about?

Q. 23E, K. Barnett. Do you see a document dated May 27, '88?

A. Yes.

Q. And does that appear to be the only document provided in there?

A. Yes.

Q. And that's a verbal reprimand for insubordination; is that correct?

A. Yes.

Q. That's the only incident?

A. That's the only one in this document.

Q. For Mr. Barnett, okay. Let's go to H. Wild, the following, that would be 23F. And do you see a document dated June 3rd, 1988?

A. Yes.

Q. And that's for insubordination?

A. Yes.

Q. And for this the employee received a verbal reprimand; is that correct?

A. Yes.

Q. Is that the only document under H. Wild?

A. Yes.

Q. Let's go down to 23H, J. Hayes. Do you see a document dated January 11, 1989?

A. Yes.

Q. And does this appear to be a document that's a verbal reprimand for insubordination?

A. Yes.

Q. Okay. Is that the only document contained in this file?

A. Yeah.

Q. Let's go down to 23O, J. Brown. Do you see only one document under J. Brown?

A. Yes.

Q. Does the document that's in there appear to be a verbal reprimand for insubordination?

A. Yes.

Q. And again that's the only incident; is that correct?

A. Yes.

Q. Let's go down to 23Q, K. Meyers. Does there appear to be only one document in that file?

A. Yes.

Q. And is that a document that's a verbal reprimand for violation of rule 18, insubordination?

A. Yes.

Q. Okay. Let's go to 23R, C. Hatcher. And is that a written reprimand for violation of rule 18, insubordination?

A. Yes.

Q. Is that the only document in that file?

A. Yes, it is.

Q. Let's go to 23S, Mr. Poole. And is this a written reprimand for insubordination?

A. Yes.

Q. Let's go to 23T, J. Gilkey. Do you see only one document in that file?

A. Yes.

Q. Is that a verbal reprimand for insubordination?

A. Yes.

Q. Let's go to 23X, the last exhibit. I can't quite

determine what the punishment was from this. Does it appear that the employee just quit?

A. I'm sorry, what was the question?

Q. Does it appear that the employee just quit because it's difficult to decipher? Are you familiar with this?

A. No, I'm not familiar with the incident, but it's concerning poor job performance, is what it says.

Q. Does it appear that the words that the supervisor appears to be recommending here is a written reprimand in paragraph 4?

A. Well, he says, "I really feel progressive discipline is in line such as a written reprimand, disciplinary layoff, et cetera."

Q. He's not asking about firing the employee, is he?

A. I don't know what "et cetera" means. It would depend upon what the employee did.

Q. Sir, we have just gone through seven individuals who for a single charge or allegation of insubordination, were given a verbal reprimand; do you recall that?

A. Yes

*** (TR beginning at page 125 line 1) ***
Testimony of L. C. Monehan (Chief Shop Steward)

Q. Did you make a statement to Charlie Goodson that the company was going to be suing the co-workers of Karl Roberts who are testifying in this case for him?
A. Not in that manner, no sir.

*** (TR beginning at page 147 line 11) ***

Q. Karl Roberts never mentioned that he would like a witness, in the lunchroom prior to the step-three grievance hearing?
A. Karl Roberts never asked for a witness.
Q. And you never heard any witness names in the step-three hearings?
A. Absolutely not.

*** (TR beginning at page 154 line 3) ***

Testimony of Charles Goodson (co-worker)

Q. Mr. Goodson, you've testified previously, do you recall that?

A. Yes, sir.

Q. You are still under oath, correct?

A. Yes, sir.

Q. Are you familiar with a man by the name of L.C. Monehan?

A. Yes, sir, I am.

Q. Within the last 30 days, has L.C. Monehan made any statements pertaining to suits to be filed against co-workers of Karl for testifying in this case?

A. Yes, he did.

Q. What did he say?

A. He said the company already had suits --

*** (TR beginning at page 157 line 14) ***

Q. Again, Mr. Goodson, do you recall the question?

A. Yes, sir.

Q. Okay, could you tell jury if L.C. Monehan had made any such statements to you?

A. Yes, he did.

Q. When did he say it?

A. It was probably somewhere in the middle of August, somewhere around there. I don't know exactly what date.

Q. Could you tell the jury what he said?

A. He just came up to me and we was talking and he said, well, the company has already had countersuits against the people who had a written statement against them.

*** (TR page 29 line 5) ***

Testimony of Michael Branscum (Group Leader)

Q. You didn't tell other employees what to do?

A. I would assist them if they needed help.

Q. Would part of your responsibilities be warning the supervisor and the department about dangers within the department, dangerous conditions?

A. Yes.

Q. If an employee was ill, would part of our responsibility be to warn the supervisor that an employee is ill?

*** (TR page 29 line 21) ***

Q. Would one of our responsibilities be if an employee was sick to tell the supervisor?

A. Yeah.

No. 97-1425

Supreme Court, U.S.
FILED
APR 1 1998
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In The

Supreme Court of the United States

October Term, 1997

KARL ROBERTS,

Petitioner,

vs.

UNIDYNAMICS CORPORATION d/b/a CRANE NATIONAL VENDORS,

Respondent,

-and-

DISTRICT NO. 9, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT UNIDYNAMICS CORPORATION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eighth Circuit applied the correct standard of review of the district court's judgment denying Respondents' motions for judgment as a matter of law following a jury verdict in favor of Petitioner on his claims under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.050.

RULE 29.6 STATEMENT

Respondent Unidynamics Corporation d/b/a Crane National Vendors, defendant below, has no parent corporation and no nonwholly owned subsidiaries.

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OPINIONS BELOW

The Judgment and the Order and Memorandum Opinion of the United States District Court for the Eastern District of Missouri granting in part and denying in part the motions for amendment of jury verdict, entered on February 26, 1996, are unreported and are reprinted in Appendix B of the Petition for Writ of Certiorari. The opinion of the United States Court of Appeals for the Eighth Circuit reversing the district court's judgment is reported at 126 F.3d 1088 (8th Cir. 1997), and is reprinted in Appendix A of the Petition for Writ of Certiorari. The Eighth Circuit's order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc is reprinted in Appendix A of the Petition for Writ of Certiorari at page 18.

STATEMENT OF THE CASE

Petitioner Karl Roberts [hereinafter "Petitioner" or "Roberts"] was discharged from his position as a welder at Respondent Unidynamics Corporation d/b/a Crane National Vendors [hereinafter "Crane"] on October 9, 1992, for repeated acts of insubordination towards his supervisor. During his employment, Roberts was a member of Respondent District No. 9, International Association of Machinists and Aerospace Workers [hereinafter "District 9" or "union"] and subject to a collective bargaining agreement between Crane and the union.

After his discharge, Roberts filed a complaint alleging that Crane had violated the Americans With Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101-12213, and the Missouri Human Rights Act ("MHRA"), Mo. Rev. Stat. § 213.050, by terminating him because of the actual disabilities of Graves disease and burns scars and the perceived disabilities of Graves disease, human immunodeficiency virus ("HIV") and Acquired Immune Deficiency Syndrome ("AIDS"). Roberts also

contended that District 9 had violated the ADA and the MHRA by failing to represent him adequately in his discharge grievance procedure because of the same alleged actual and perceived disabilities. On August 23, 1995, the district court entered partial summary judgment for both Crane and the union on Roberts' claims that he was discriminated against because of the actual disabilities of burns scars and Graves disease, leaving for trial only Robert's claims that he had been discriminated against based on perceived disabilities.

The legal issues in the case were tried before a jury from September 12 through September 19, 1995. At trial, evidence was presented that Roberts had never been diagnosed with HIV or AIDS, but had been diagnosed with Graves disease, a hyperthyroid condition, in early 1992. Some of Roberts' co-workers testified that in early 1992 they noticed that Roberts was losing weight, had bulging eyes and a sunken face, and looked fatigued. Other co-workers testified that they did not notice any change in Roberts' physical appearance in 1992. After the diagnosis, Roberts' condition was controlled through medication and his symptoms were alleviated. Roberts' doctor testified at trial that by June of 1992, less than two months after diagnosis of the disease, Roberts' weight had increased, his heart rate had improved and that he was recovering from the disease because of the medication. At least one of Roberts' co-workers testified that Roberts' physical appearance improved prior to October of 1992 and that he had regained weight. Roberts informed his supervisor, Dennis Blake, that he had Graves disease, that it was treatable with medication and that it would not affect his job performance.

On September 30, 1992, Roberts, by his own admission, repeatedly refused the direct orders of Blake concerning a note Roberts had written at Blake's desk which Blake asked to see. The shop steward was called and told Roberts to show Blake

the note. Roberts admitted at trial that Blake told him, after reading the note, that Roberts' actions were childish and a waste of time and that he was on notice that if that kind of behavior continued, Blake would take further action.

On the following Monday, October 5, 1992, Blake ordered Roberts to pick up an empty wire spool lying on the floor near Roberts' work area. Roberts did not pick up the spool, but resumed welding. Blake did not say anything more to Roberts but left. Roberts did not pick up the spool at any time during his shift or during the course of the next day, October 6, 1992, nor did he ask anyone else where the spool was located.

The following day, when Blake noticed the spool had not been discarded, he once again asked Roberts to pick up the spool. According to Roberts' own trial testimony, Blake then said, "Pick it up, that's an order." Roberts responded, according to his own testimony, "I really don't appreciate the way you said that." Blake then said, "Well, pick it up, that's an order." Roberts said "Okay," but did not pick up the spool. Instead, he resumed welding. Roberts admitted that Blake's orders on October 5 and 6 were direct orders and that he did not comply with either order.

Roberts testified that he continued to work until there was a break in the production line and then looked for the spool, which he did not find. Two other coworkers who were present, however, testified that Roberts did not look for the spool but that they did. One of those coworkers, James Woolsey, testified that he found the spool within five minutes, that it was in the open and that is was visible from Roberts's work area.

After Blake reported Roberts' repeated acts of insubordination to Kay Merz, Crane's Human Resources manager, Merz concluded that Roberts should be suspended for "blatant insubordination" pending further investigation. Ron

Wilson, Blake's supervisor and the general foreman of the plant, concurred with the suspension and Roberts, in the presence of L.C. Monehan, the shop steward, was informed of the suspension. Roberts then asked Wilson or Monehan, "What am I supposed to do, show this guy the color underwear I got on if he asks me?" Monehan told Roberts that he was required to carry out the instructions of his supervisor.

Following Roberts' suspension, Edwin Barutio, Crane's Vice President of Human Resources, conducted an investigation of the incident, interviewing Blake, Monehan and Wilson and examining Roberts' personnel file. Barutio then made the decision to terminate Roberts after discussing the situation with Kay Merz. Barutio testified that his reasons for terminating Roberts were because Roberts had engaged in several instances of blatant insubordination within a very short period of time, the incidents were highly visible to other employees and Roberts' attitude during these incidents was "cavalier." Barutio also considered Roberts' seniority status.

Immediately after he was suspended, Roberts filed a grievance with the Union. Roberts did not include in his grievance any claim that he was being discriminated against because of any perceived disabilities. On October 20, 1992, a third step grievance hearing was held between Roberts, the union and the company. Roberts did not claim at the third step grievance hearing that he was being discriminated against because of his Graves disease or the perception that he had HIV or AIDS, although he was permitted to explain the incidents of September 30, October 5 and October 6 as he saw them. Barutio testified at trial that the third step grievance hearing was the first time he had ever seen Roberts.

Crane thereafter denied Roberts' grievance. It was undisputed at trial that Barutio made the decision to deny the grievance and terminate Roberts. Barutio's decision to deny

the grievance was based on his disbelief of Roberts' version, Roberts' repeated insubordination, and Roberts' "flippant attitude," as demonstrated by his remarks regarding the color of his underwear. Barutio also testified that when he denied the grievance, he did not know that Roberts had Graves disease and had heard no rumors about Roberts contracting AIDS or HIV.

The Union notified Roberts on November 17, 1992 that it would not process Roberts' grievance to the next step because of lack of merit. Union representative Soutier testified that the union decided not to arbitrate the matter because he believed that Blake's requests were reasonable, that Roberts' acts of insubordination occurred over a two-day period and because he did not believe that Roberts had forgotten to pick up the spool on October 5.

At trial, as proof that he was discharged because Crane mistakenly perceived his Graves disease to be HIV or AIDS, Roberts presented the testimony of several other employees, who were not members of management, that they noticed that Roberts was losing weight, looked tired and had bulging eyes in early 1992. Not one of these employees, however, testified that they believed Roberts had AIDS. In fact those witnesses testified that they did **not** believe that Roberts had AIDS or HIV. The **only** witness who testified that he thought that Roberts might have HIV or AIDS was a Paint Department employee, Wes Kelley, who testified that another bargaining unit employee, Michael Branscum, advised him not to use Roberts' respirator because he may have AIDS. This witness also testified, however, that nothing else was said, no one else was present, that he did not repeat the alleged statement to anyone, that he never advised company officials of the alleged statement and had no evidence that the other employee relayed his alleged concern to representatives of the company.

The only other comments regarding HIV or AIDS adduced at trial were two alleged jokes by bargaining unit employee Patrick Brown that Roberts may have had HIV. Employee John Ray testified that Brown jokingly suggested that Roberts had AIDS while a number of employees were at a time clock in the vicinity of Blake. Brown denied telling anyone that he believed Roberts had AIDS. Ray conceded that Brown communicated the alleged remark in a joking manner, that when the statement was made, Ray took it as a joke, that Blake, while allegedly at his desk doing paperwork in the vicinity of the time clock, did not respond to the joke and did not acknowledge the joke in any manner. Ray also admitted that he had never heard Blake speak to anyone about the possibility of Roberts having the HIV virus, never heard any company representative speculate that Roberts had HIV or AIDS and never advised any company representative of Brown's alleged joke. Ray conceded that he knew of no facts that would make him believe that Blake, Wilson, Merz, Barutio or any other company official believed that Roberts had HIV or AIDS.

Bargaining unit employee Kenneth Garner also testified that Brown expressed to him Brown's view that Roberts might have AIDS. Garner admitted that when Brown allegedly told him that Roberts may have AIDS, no company representative was present, the statement was made on one occasion only and that Garner did not disseminate the statement to anyone else. Garner also conceded that during the period of June to October 1992, the alleged comment of Brown was the only one he heard regarding the possibility that Roberts had AIDS, that he possessed no evidence that Brown ever told Blake that he believed Roberts was HIV positive or had AIDS and that no supervisor ever advised him that the company perceived Roberts to have AIDS or HIV.

Aside from these three comments made by bargaining unit employees, no other witness testified that they heard any rumors

that Roberts may have had AIDS, HIV or Graves disease. Witnesses Gary Inness, Patrick Brown, James Woolsey, Marvin Mullen, Mike Branscum and Charles Goodson, all Crane employees, testified that they had **not** heard any rumors that Roberts had HIV or AIDS and they had not heard any company representative speculate that Roberts had AIDS or was HIV positive. Several of these employees also testified that nothing the company said or did led them to believe that any representative of Crane perceived Roberts as being HIV positive or having AIDS. In fact, not one witness could corroborate Roberts' allegation that any company representative or supervisor, including Blake, Barutio, Merz or Wilson, perceived that Roberts had AIDS or HIV.

Roberts' own testimony at trial was replete with admissions that he did not have any evidence to support his claims of discrimination based on perceived disabilities. He admitted at trial that he gave sworn testimony in January of 1993 in which he stated that he did not know why he was fired. During that testimony, Roberts did not contend that he was fired for any perceived disability. He also admitted during trial that in January of 1993 he did not believe his discharge was because of a perceived disability and that from January of 1993 to the time of trial, he had learned no new facts which would make him think he was the victim of a perceived disability. He also admitted that at the time he gave his deposition in October of 1994, he had no evidence that the company perceived him as having HIV. He admitted during cross examination that he had no more evidence at the time of trial than he had at his deposition, that is, none. Roberts also testified that he never advised National Vendors that he considered himself to be disabled or handicapped, never perceived himself to be disabled nor felt he was being perceived as disabled, never claimed discrimination on the basis of a perceived disability, never told Blake or other officials of Crane that he was HIV positive and was never told

by a company official that he was regarded as being either HIV positive or having AIDS. Roberts also testified at trial that none of the "HIV/AIDS gossip" alluded to during trial was among company officials, supervisors or management and that none of the comments he believed to be supportive of an alleged perception were linked in any way to company representatives. Roberts conceded at trial that he lacked evidence that Blake perceived him as being HIV positive in 1992, and that he lacked evidence supportive of the assertion that Crane perceived him as being HIV positive even as of the date of trial. In fact, Roberts admitted that he had **no evidence** to support his claim that the company perceived him as having HIV or AIDS.

In spite of the complete dearth of evidence that the relevant decisionmaker at Crane perceived Roberts to be disabled and Roberts' own admissions at trial, the district court permitted Roberts' claims under the ADA and the MHRA to go to the jury. On September 19, 1995, the jury returned a verdict in Roberts's favor for actual damages in the amount of $535,000. On February 26, 1996, the court entered judgment on the verdict but reduced the total award to $335,460 based on the statutory limitations imposed by 42 U.S.C. § 1991(b)(3) on compensatory and punitive damages. The district court also denied Roberts' request for reinstatement and deemed an award of front pay to be inappropriate.

Following the district court's denial of post trial motions, including renewed motions for judgment as a matter of law by Crane and District 9, Respondents filed timely notices of appeal. Roberts also filed a cross appeal. The Eighth Circuit determined that Roberts' evidence presented at trial was insufficient to support the jury's verdict on Roberts' claims against Crane and District 9 and held that the district court had erred in failing to grant defendants' motions for judgment as a matter of law on Roberts' claims. The Eighth Circuit recognized that Roberts'

entire case against Crane was based on Roberts' own speculation and that Roberts had never linked the alleged rumors about his illness to the relevant decisionmaker at Crane, Edwin Barutio. The Eighth Circuit committed no error in reaching this conclusion and, contrary to the assertions contained in the Petition, it did not so depart from the accepted and usual course of judicial proceedings as to justify the exercise of this Court's supervisory powers.

REASONS FOR DENYING THE WRIT

Roberts' Petition for Writ of Certiorari is based solely on his disagreement with the Eighth Circuit's recognition of the speculative nature of Roberts' claims and the jury's verdict. Roberts' disagreement with the Eighth Circuit's reasoning, however, does not constitute a sufficient basis for this Court to exercise its supervisory power over the Court of Appeals and issue a writ of certiorari. There is simply nothing about this case which merits review by this Court, either because of disagreement among the Circuit Courts of Appeals, because an important issue of federal law should be resolved or because the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Indeed, many of the questions which Roberts asserts are presented for review are not even raised by the Eighth Circuit's opinion. For example, Roberts contends that the question of "whether a perceived disability claim under the Americans with Disabilities Act will require Plaintiffs to produce direct evidence of the Defendant's perception," is at issue. (Petition, at i). The Eighth Circuit, however, never held that direct evidence of perception of a disability was required under the ADA; it simply held that Roberts had not presented *any* evidence that the relevant decisionmaker, Edwin Barutio, perceived Roberts to

be disabled in any way. Similarly, Petitioner asserts that the question of "[w]hether a perceived disability claim under the Americans with Disabilities Act requires a record of actual impairment before liability may be imposed for being regarded as an impairment" is an issue raised by the Eighth Circuit's opinion. (Petition, at i). Contrary to Roberts' assertions, however, the Court of Appeals did *not* rule that a perceived disability claim required proof of an actual impairment; it held that a plaintiff in a perceived disability case must prove perception on the part of the relevant decisionmaker that the plaintiff was disabled within the meaning of the ADA and concluded that, in this case, such a fact had not been proven. Nor did the Eight Circuit hold that "statistical evidence" offered to demonstrate pretext "must be exact in nature and character of the offense to allow similarly situated comparisons," as Roberts also contends in his Petition. (Petition, at i). The Eighth Circuit simply held that Roberts had not established that the employees with which he wished to be compared were similarly situated. In fact, because Roberts presented *no* evidence that those employees were not in the protected class, it is disingenuous for him now to argue that the Eighth Circuit's analysis is flawed.

Two of the other issues raised by Roberts in his Petition are simply factual inquiries — whether his Graves disease "mistakenly believed to be HIV or AIDS, qualifies as a perceived disability under the Americans With Disabilities Act" and

> whether direct evidence of perceived disability by a chief shop steward who participated in the grievance process is sufficient to impose liability against a Union under the Americans With Disabilities Act.

(Petition, at i). The Eighth Circuit correctly held that Roberts had not presented at trial sufficient evidence for either of these findings and that Crane and the Union were, therefore, entitled

to judgment as a matter of law. Roberts' disagreement with the Eighth Circuit's review of the evidence, however, is not a sufficient basis for the granting of a writ of certiorari.

In fact, the only question even arguably raised by the Eighth Circuit's opinion is whether it applied the correct standard of review to its evaluation of the evidence presented at trial. With respect to that issue, certiorari is justified only if the Court of Appeals' opinion "has so far departed from the accepted and usual course of judicial proceedings, or has sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Rule 10(b), Rules of the Supreme Court of the United States. It is clear from the Eighth Circuit's opinion, however, that it applied the correct standard of review, analyzed the evidence at trial properly and did not depart at all from "the accepted and usual course of judicial proceedings." The issuance of a writ of certiorari, therefore, is not justified.

It is well-established that an appellate court reviews *de novo* a district court's denial of a motion for judgment as a matter of law brought pursuant to Rule 50 of the Federal Rules of Civil Procedure, applying the same standards as the district court. *DeJarnette v. Corning, Inc.*, 138 F.3d 293 (4th Cir. 1998); *Tidwell v. Carter Products*, 135 F.3d 1422 (11th Cir. 1998); *Tschira v. Willingham*, 135 F.3d 1077 (6th Cir. 1998); *Beal Mortgage, Inc. v. Federal Deposit Insurance Corporation*, 132 F.3d 85 (D.C. Cir. 1998); *Nicks v. State of Missouri*, 67 F.3d 699 (8th Cir. 1995); *Sullivan v. National Football League*, 34 F.3d 1091, 1096 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995). The Court of Appeals, however, need not show deference to the trial court's assessment of the sufficiency of the evidence. *Tschira*, 135 F.3d at 1081. The appellate court's task in reviewing a judgment entered on a jury verdict "is simply to inquire whether, viewed in the light most favorable to [the nonmoving party], the evidence at trial supports the verdict."

Rademaker v. Nebraska, 906 F.2d 1309, 1311 (8th Cir. 1990); *see also Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir. 1997) (en banc), *cert. denied*, 117 S. Ct. 2510 (1997). A jury verdict should be reversed for insufficient evidence if the appellate court concludes that "no reasonable juror could have returned a verdict for the non-moving party." *Ryther*, 108 F.3d at 836. Although the nonmoving party is entitled to "the benefit of all reasonable inferences from the evidence," a court should grant a motion for judgment as a matter of law when the nonmoving party has presented insufficient evidence "to support a jury verdict in his or her favor." *Abbot v. City of Crocker*, 30 F.3d 994, 997 (8th Cir. 1994); *see also Nicks*, 67 F.3d at 704. In addition, inferences in favor of the non-moving party "must be more than speculation or conjecture to be reasonable." *Day v. Johnson*, 119 F.3d 650, 654 (8th Cir. 1997).

The standard set forth above is precisely the standard of review applied by the Eighth Circuit in this case. (App. A, at 9-10). The Court of Appeals acknowledged that it was required to accord Petitioner "the benefit of all reasonable inferences," (App. A, at 10), and it did so. Even viewing the evidence "in the light most favorable to Roberts," (App. A, at 15), the Court concluded that the evidence simply showed that "Roberts was terminated because he failed to follow his supervisors's orders," (App. A, at 15), and not that Crane perceived him to be disabled or fired him based on such an alleged perception. The Court of Appeals recognized that Roberts' claims were based on "unsupported speculation" that the relevant decisionmaker had heard rumors that he had AIDS or HIV and it correctly surmised that such speculation was "insufficient to permit a reasonable jury to find for him on the issue of Crane's knowledge of those rumors." (App A, at 12). There was nothing incorrect about the Court of Appeals' standard of review or its application of that standard to the evidence presented at trial.

In support of his Petition, Roberts gives an exhaustive summary of his version of the evidence presented at trial to bolster his argument that this Court should exercise its supervisory authority over the Court of Appeals. Petitioner's recital of the facts, however, is no more than a disagreement with the Eighth Circuit's analysis of the evidence presented at trial and in no way demonstrates that the Eighth Circuit so far departed from the "accepted and usual course of judicial proceedings" as to justify an exercise of this Court's supervisory power. Moreover, in attempting to enhance his argument, Roberts, as he did in the Court of Appeals, mischaracterizes the evidence presented at trial in several major respects.

For example, Roberts repeatedly asserts in his Petition that his co-workers believed him to have AIDS and believed that he was going to die. (Petition, at 1, 14). In fact, as explained above, of the nine co-workers whose testimony Roberts presented at trial in support of his claims, only **one** testified that he actually believed that Roberts had HIV or AIDS. Each of these witnesses denied that they had ever heard **any** members of management make **any** references to a perception that Roberts may have had AIDS or HIV. Most significantly, Roberts did not establish that Edwin Barutio, the *decisionmaker* with respect to Roberts' termination, believed him to have HIV or AIDS or believed that his condition substantially limited any of his major life activities. Similarly, there was no evidence that Barutio had any knowledge of Roberts' Graves disease or believed that it substantially limited any of his major life activities. Further, only *one* witness — Gary Inness — testified that he "kind of thought he was going to die." (App. D, at 71). Inness also testified, however, that "I didn't know what was wrong with him." (App. D, at 71). There was **no** other testimony that any employee — bargaining unit or supervisor — believed that Roberts was dying. Roberts' statement that "Roberts' co-workers thought he was going to die," (Petition, at 14), is, consequently,

unsupportable. Roberts also fails to note that Blake himself knew Roberts' symptoms to be caused by Graves disease; knew, because Roberts had told him, that the disease was controlled by medication; and, further, knew that the disease did not interfere with Roberts' performance of his job. The evidence was undisputed, therefore, that no one at Crane, including Blake and Barutio, believed Roberts to be substantially limited in his major life activities because at HIV, AIDS or Graves disease.

Roberts also contends that Patrick Brown stated "on two separate occasions, in front of others including shop steward Monehan and supervisor Blake, that Petitioner had AIDS." (Petition, at 17). Roberts once again exaggerates the trial testimony to support his version of the facts. At trial, John Ray testified that Patrick Brown joked with a group of employees, saying Roberts was losing weight "because he probably has AIDS." Ray testified that the group of employees did **not** include Dennis Blake, but that Blake's desk was in the area and Blake was working at his desk at the time. There was no evidence that Blake even heard the joke. On cross examination, Ray admitted that Blake did not react in any manner and continued working at his desk without acknowledging the joke. Significantly, Roberts admitted at trial that he had no evidence that Blake perceived him as being HIV positive in 1992 and had no evidence to support his claim that Crane perceived him as having HIV or AIDS.

As he did at trial and in the Court of Appeals, Roberts also seeks to mischaracterize the position of Michael Branscum, an employee who allegedly made a statement to co-worker Wes Kelley that Roberts may have had AIDS. (Petition, at 1, 5, 16). Thus, Roberts contends that Branscum was an "assistant supervisor," (Petition, at 1, 16), and that one of Branscum's duties was to inform his supervisor "of any employees who may be ill." (Petition, at 5). In fact, Branscum was a bargaining unit employee who held the position of group leader in the

Paint Department, where Roberts worked for two weeks. In an attempt to make the jury believe that Branscum was a member of management and **not** a hourly employee, counsel for Roberts throughout trial repeatedly referred to Branscum and other group leaders as "assistant supervisors." The district court, however, sustained Crane's objection to the characterization of group leaders as "assistant supervisors." Branscum himself denied that his job was to supervise other employees and Roberts presented no testimony to the contrary. Thus, Roberts' references to Branscum as an "assistant supervisor" is contradicted not only by the testimony at trial but by the trial court's ruling on that testimony, a ruling which Roberts never appealed.

Roberts also misstates the facts concerning the events leading to his discharge. With respect to the note-writing incident, he states that "Mr. Blake did not cite Petitioner for any wrongdoing after Petitioner revealed the note." (Petition, at 6). This statement is directly contrary to the testimony of both Roberts and Blake. Roberts admitted on cross examination that Blake told him at the time of the incident that Roberts' actions were childish and a waste of time and that Roberts was placed on notice that if that kind of behavior continued, Blake would take further action. Roberts admitted that he understood and acknowledged Blake's warning.

Roberts also alleges that "Mr. Blake conceded that he had no authority to seize or demand to see a note written by an employee on break-time." (Petition, at 6). In fact, Blake testified that he did not know of a specific rule which would permit him to look at the note, but he did not testify that it was not within his supervisory power to do so. The fact that there was no specific rule on the subject did not negate Blake's overall supervisory authority. More importantly, Roberts conceded on cross-examination that some of Blake's requests to review the note in question occurred during **non**break time — *i.e.* during working time.

With respect to the incidents regarding the spool on October 5 and 6, 1992, Roberts once again misstates the testimony of witnesses. Roberts admitted on cross examination at trial that he received direct orders from Blake to pick up the spool on October 5 and 6, 1992 and that he did not comply with either of those direct orders. Roberts also alleges that on October 6, when he was caught up with production, he "looked for, but could not find the spool Mr. Blake had referred to." (Petition, at 8). Both Woolsey and Inness testified, however, that although they looked for the spool, Roberts did *not*. Woolsey testified that he found the spool within five minutes, that it was in the open and that it was visible from Roberts' work area. Roberts also testified that on October 6, Blake gave him a direct order at least twice to pick up the spool and that his response was "I don't appreciate the way you said it." Roberts then admitted and that he did **not** pick up the spool at any time on the 5th or the 6th.

Roberts also contends, as part of his "set up" theory, that "it was odd that his supervisor asked him to work overtime on October 6, 1992," and that "[c]ommon practice by Crane would have had Petitioner working overtime at the station where the other employee was transferred to." (Petition, at 9). There is no testimony, however, that there was any such "common practice" at Crane. The testimony upon which Petitioner relies for this proposition is his own and is simply his disagreement with Blake's actions. Roberts testified that another welder was on the line before Roberts arrived and that "what Dennis should have done is he was on that line and he should have stayed right there where I got put." (App. D, at 70). Neither Petitioner nor any other witness testified that it was Crane's "common practice" during overtime to keep welders on the lines they had been working on during regular time. Petitioner's assertion is based solely on his own belief as to what "should" have been done.

Although he does not dispute that Barutio was the decisionmaker with respect to his termination, Roberts repeatedly attempts to infer a sinister motive from the fact that Blake's memorandum regarding the October 6 incident contains the term "Termination" in the subject heading but the letter terminating Roberts was dated October 9, 1992. (Petition, at 8-9). In fact, the testimony at trial was undisputed that *Barutio* and not Blake or Wilson made the decision to terminate Roberts and that *Kay Merz*, not Blake or Wilson, made the decision to suspend Roberts. Moreover, both Blake and Barutio provided a simple explanation for the use of the word "Termination" in Blake's typewritten memorandum, which Roberts did not rebut at trial. Blake testified that he completed a handwritten memo on October 6 documenting the incidents of October 5 and 6 and that Wilson's secretary typed the memorandum at a later date. He also testified that he did not put the subject "Termination" on his handwritten memo but that the secretary later filled in all the headings on the memo, including the "Termination" language. Blake testified that he did *not* know that Roberts would be discharged when he wrote the memorandum. Barutio corroborated Blake's testimony, stating that he was given Blake's handwritten memo, which did not contain any subject headings and did not contain the word "Termination." Roberts did not dispute this testimony or offer any contradiction of it.

Significantly lacking from Roberts' argument and statement of facts is *any* evidence that the decision maker with respect to Roberts's termination, Edwin Barutio, had any knowledge or perception that Roberts had Graves disease and/or HIV or AIDS or that Barutio perceived Roberts to be substantially limited in any of his major life activities. In fact, the uncontradicted evidence at trial was that Barutio did not even meet Roberts until *after* he made the decision to terminate him, had never heard any HIV or AIDS rumors about Roberts and had never been told by anyone that Roberts had Graves disease.

In his Petition, Roberts also relies heavily on "uncontradicted statistical evidence" of what he believes to be pretext by Crane with respect to his discipline. (Petition, at 10, 24-26). He alleges that the Court of Appeals' treatment of this alleged "statistical evidence" was "the most comprehensive misapprehension of the facts and law." (Petition, at 24). Roberts, however, neglects to mention that at trial he presented not one iota of evidence that the workers with whom he seeks to be compared were similarly situated employees in the non-protected group, a prerequisite for establishing disparate treatment.

It is well settled that in order to prevail on a claim that non-protected employees were treated differently, a plaintiff must prove that he or she was treated differently than **similarly situated** employees in a non-protected group. *Harvey v. Anheuser-Busch*, 38 F.3d 968 (8th Cir. 1994); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995); *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (6th Cir. 1992). To demonstrate that others were similarly situated, the plaintiff must prove that

> the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have been engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

Mitchell, 964 F.2d at 582-83; *see also Harvey*, 38 F.3d at 970; *Phillips v. Holladay Property Services, Inc.*, 937 F. Supp. 32, 36 (D.D.C. 1996); *Perkins v. Regents of the University of Michigan*, 934 F. Supp. 857, 862 (E.D. Mich. 1996); *Fuller v. GTE Corp./Contel Cellular, Inc.*, 926 F. Supp. 653 (M.D. Tenn. 1996); *Mazzella v. RCA Global Communications*, 642 F. Supp. 1531 (S.D.N.Y. 1986), *aff'd*, 814 F.2d 653 (2d Cir. 1987).

As the Court of Appeals held, Roberts presented no evidence that he was similarly situated to the individuals to whom he wishes to be compared. He did not present any evidence that any of the employees with whom he wishes to be compared had the same supervisor, worked in the same position, or engaged in similar conduct. Of those cited for insubordination discussed by Roberts in his Petition, only six, including Roberts, were supervised by Blake. Of those six, there is **no** evidence that any worked in the same position as Roberts. In fact, two of the six, including Roberts, were terminated for insubordination, a percentage of 33%, hardly evidence of disparate treatment.

Perhaps more importantly, Roberts presented **no** evidence that these employees engaged in conduct similar to that of Roberts. Although each of the six were cited for insubordination, there was no demonstration the insubordination of the other employees was as serious, visible and repeated as was Roberts'. In fact, Barutio testified to the contrary and Roberts did not offer any evidence to dispute Barutio's testimony. Roberts did not establish that any of these employees engaged in at least three acts of direct insubordination over a period of three working days. Roberts presented no evidence that the other employees' insubordination was "highly visible" as Barutio testified Roberts' was, that the other employees exhibited the "cavalier attitude" which Roberts exhibited, or that these employees' acts seriously undermined their supervisor's authority. All of these circumstances were factors in Barutio's decision to terminate Petitioner.

Most importantly, however, Roberts provided absolutely no evidence that the employees with whom he wished to be compared were not in the protected class, *i.e.*, that they were not disabled. Indeed, Roberts presented absolutely no evidence regarding the physical condition of any of these employees. The jury was presented with no information that those employees

were not in the protected class. The Eighth Circuit was correct, therefore, in its assessment that Roberts had failed to prove different treatment from similarly situated employees.

Moreover, Roberts' recitation of the statistical evidence presented at trial is simply incorrect. The uncontradicted statistical evidence to which Petitioner refers actually showed that four employees of thirty-one who were terminated were discharged for insubordination, while the larger majority of workers were discharged for less serious offenses like absenteeism or production interference. None of the employees disciplined for insubordination had committed repeated acts of insubordination over as short a time period as Roberts. Those who had committed repeated acts of insubordination did so over extended periods of time, with the incidents four months to almost two years apart. The other employee discharged for insubordination, Clarence Bowens, actually was disciplined for only four acts of insubordination — not six, as Petitioner claims — and those incidents occurred over a time period of over two years. Bowens was in fact discharged for refusing the direct orders of his supervisor, Dennis Blake. Barutio testified, without contradiction, that in assessing discipline to be given for a particular incident, it was the company's practice, as well as standard industry policy, not to take into consideration discipline that was given to an employee over twelve months before.

Thus, Roberts' alleged "uncontradicted statistical evidence" of discrimination was, as the Eighth Circuit held, insufficient to demonstrate that he was disparately treated because of his alleged perceived disability. Roberts' theory that he was singled out for termination, and that his discipline was "inconsistent with [Crane's] progressive system of discipline," (Petition, at 26), was not warranted by the evidence presented at trial. In fact, James Woolsey and Gary Inness testified that they were

well aware that Roberts' refusal to obey the directions of his supervisor could subject him to termination; they testified that they looked for the spool in order to avoid trouble for Roberts.

In spite of the fact that it was his own failure to present sufficient evidence to support the jury verdict which led to reversal, Roberts accuses the Eighth Circuit of "bias," (Petition, at 19), contends that the appellate court improperly adopted Respondents' "version of the evidence," (Petition, at 2, 15, 18, 22, 23-24, 27, 29) and argues that it exhibited no deference to the jury verdict. (Petition, at 2, 15, 18, 26). Roberts' argument, apparently, is that the Court of Appeals was permitted to look only at the evidence Roberts himself presented at trial, and was not permitted to examine the entire record, including the uncontradicted evidence put forward by Respondents. Contrary to Petitioner's argument, however, the federal courts of appeals are entitled to examine the *entire* record to determine if there was sufficient evidence to support the jury's verdict when reviewing the denial of a motion for judgment as a matter of law. *Furr v. Seagate Technology, Inc.*, 82 F.3d 980 (10th Cir. 1996); *Stockstill v. Shell Oil Co.*, 3 F.3d 868 (5th Cir. 1995). The Eighth Circuit did not "adopt" Respondents' version of the evidence; it simply ruled that Roberts' evidence of disability, perception, discrimination and causation was insufficient to justify submitting the case to the jury. The Court of Appeals' reliance on Respondents' evidence occurred only when such evidence was uncontradicted, such as Barutio's testimony that he had never seen Petitioner until the third step grievance hearing. Nor did the Court of Appeals determine *any* credibility issues: all reasonable inferences were viewed in Roberts' favor.

Roberts also alleges that the Eighth Circuit required him to prove by direct evidence perception on the part of Crane that he was substantially limited in his major life activities. (Petition, at 3, 16, 29). There is no indication anywhere in the Court of

Appeals' opinion, however, that it required any such thing. The Eighth Circuit held that, in order to demonstrate a prima facie case under the ADA and the MHRA, Roberts was required to establish that the decisionmakers at Crane and the union regarded him as having a condition which substantially limited his major life activities. (App. A, at 10). After drawing all reasonable inferences in favor of Roberts, the Eighth Circuit concluded that Roberts had not come forward with sufficient evidence — direct or circumstantial — that established that the decisionmakers at Crane or District 9 regarded him as having such a condition. The Court of Appeals also held that even if the decisionmaker at Crane held such a perception, Roberts had failed to adduce any evidence that he was terminated because of the alleged perceived disability. (App. A, at 13). There is nothing in the Court of Appeals' opinion that demonstrates that Roberts' lack of direct evidence of perception was the reason the Eighth Circuit reversed the decision of the district court. Instead, it is apparent that the Eighth Circuit concluded that Roberts had not established sufficient circumstantial evidence to demonstrate a perception of disability because he "failed to link the alleged rumors to Crane decisionmakers." (App. A, at 11-12). Roberts' total lack of any evidence of perception or causation was the reason for the Court of Appeals' holding and *not* any error on the part of the Eighth Circuit in requiring direct evidence.

Moreover, while the Court of Appeals was required to view all reasonable inferences in favor of Roberts, all inferences drawn by the jury must have been *reasonable* and not speculative. Roberts' extensive recitation of his version of the evidence does not disguise the fact that his entire case was built upon his own speculation, speculation which the jury accepted but which the Court of Appeals held to be insufficient to impose liability. The inferences drawn by the jury were not reasonable, but speculative and conjectural. Petitioner's arguments

notwithstanding, the crux of Roberts' trial evidence and his argument to the jury required unreasonable and speculative inferences that the jury, as a matter of law, was not permitted to make. As the Court of Appeals ruled, there is not one scintilla of evidence to link the alleged rumors of HIV or AIDS (which consisted of two comments and one joke by and among hourly employees) to the decisionmaker, Barutio. Liability based on such conjecture and speculation is not permitted under the ADA, the MHRA or any other law, as the Eighth Circuit correctly held.

Thus, Roberts' arguments that the Court of Appeals applied the incorrect standard of review, required direct evidence of perception and deprived him of his Seventh Amendment rights are both factually and legally unsound. The Eighth Circuit reversed the district court's judgment not because it improperly applied the standard of review but because its reading of the entire record submitted at trial showed that Roberts had failed to meet his burden of proving that Crane and District 9 discriminated against him. Simply because the Eighth Circuit refused to accept Roberts' speculation as a basis of liability does not mean that its judgment was incorrect or that its decision so far departed from the accepted and usual course of judicial proceedings that the supervisory power of this Court should be exercised.

CONCLUSION

Petitioner has presented this Court with no cognizable reason to review the Eighth Circuit's decision. There is no conflict among the circuits on an important matter, no significant federal question which should be settled by this Court and no decision which has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Nothing in the Eighth Circuit's opinion is inconsistent with the appropriate standard of review of a district court order denying judgment as a matter of law and nothing in the Court of Appeals' holding warrants review by this Court.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 1 1998
CLERK

(3)

Nº. 97-1425

In The
Supreme Court of The United States
October Term 1997

KARL ROBERTS,
Petitioner,

v.

UNIDYNAMICS CORPORATION, et al.
Respondents.

Petition For A Writ Of Certiorari
To The United States Court of
Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether this Court should exercise its jurisdiction over a fact-specific decision by the Eighth Circuit Court of Appeals that there was insufficient evidence to support the jury's verdict in a case alleging discrimination on the basis of perceived disability against Petitioner's employer and union where there was no evidence that the union's decision-maker perceived Petitioner as having an impairment, perceived Petitioner as substantially limited in a major life activity, or discriminated against Petitioner.

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STATEMENT OF THE CASE

Petitioner was employed by Crane National Vendors ("Crane"), where he was represented by District 9 of the International Association of Machinists and Aerospace Workers ("District 9").

In the Spring of 1992, Petitioner was diagnosed by his physician as having Graves' disease, a hyperthyroid condition. Petitioner's ability to perform his job was never questioned. There was no evidence that petitioner was limited in any way in performing any major life activity. The parties stipulated below that, "Plaintiff's Graves disease did not constitute an impairment that limited any of Plaintiff's major life activities." (Transcript Volume 2, p. 77)

> Crane maintained a plant rule which provided:
>
> The use of abusive language toward a supervisor or manager or refusal to carry out instructions of a supervisor or member of management will not be tolerated and will subject the employee to discharge.

(Defendant Crane's Exhibit F, p. 61)

On September 30, 1992, Petitioner refused an order to show his supervisor a note he had written. Petitioner was

warned that any further acts of insubordination would result in discipline. In this regard, Petitioner testified:

Q. So as of September the 30th your supervisor told you that if this kind of behavior, meaning refusing to do what he tells you, continued he, the supervisor, would take further action?

A. Yes.

Q. And you know that?

A. Yes.

Q. You fully understood it?

A. Yes.

Q. And you acknowledged that warning; did you not?

A. Yes.

(Transcript Volume 3, pp. 98-99, emphasis added)

Shortly after this incident, over the two day period of October 5 and 6, 1992, Petitioner repeatedly failed to obey a supervisory order to pick up a wooden welding spool. In this regard, petitioner testified as follows:

Q. You certainly don't deny receiving the order to pick up a spool on October the 5th, do you?

A. Absolutely not.

Q. And you don't deny receiving the order on October the 6th, do you?

A. No.

Q. It would be a fair statement to say that both of those orders were direct orders?

A. Absolutely.

Q. And you failed, didn't you sir, to comply with both of those orders?

A. Yes.

(Transcript Volume 3, pp. 108-109)

As a result of his repeated failure to obey supervisory orders, Petitioner was suspended and ultimately discharged.

Petitioner filed a grievance with District 9. Although the collective bargaining agreement covering Petitioner provided for a four step grievance procedure, the first two steps are routinely bypassed in discharge cases in order to arrive at a speedier result, and this practice was followed in Petitioner's case.

Prior to the third step hearing on Petitioner's grievance, District 9 shop steward L.C. Monehan asked Petitioner's employer to reinstate him, to no avail.

District 9 Business Representative Robert Soutier was in charge of handling Petitioner's grievance at the third

step. Soutier was responsible for approximately 20 bargaining units including the Crane unit. Annually, these bargaining units generated 500-600 grievances, approximately 300 of which resulted in third step grievance meetings. As a result of this workload, Soutier's practice was to meet with a grievant immediately prior to the third step grievance meeting. Consistent with this practice, Soutier met with Petitioner for the first time on October 20, 1992, immediately prior to Petitioner's third step meeting. (At this time, Petitioner's physical appearance was unremarkable.) Petitioner was given an uninterrupted opportunity to tell his story at the third step meeting. At no time during this meeting did Petitioner contend that he had been terminated because of any actual or perceived disability. After the meeting, Crane denied Petitioner's grievance. Thereafter, Soutier made the decision not to arbitrate Petitioner's grievance, due to Soutier's belief that the grievance lacked sufficient merit to warrant arbitration.

Subsequent to his discharge, Petitioner filed a charge with the Equal Employment Opportunity Commission which, while alleging discrimination based on Graves' disease, did not allege discrimination based on perceived HIV/AIDS. Thereafter, petitioner filed suit in the U.S. District Court against Crane and District 9, alleging as the

basis of discrimination both Graves' disease and perceived HIV/AIDS.

The trial court judge, in discussing the motions submitted at the close of Petitioner's case, noted that:

> I guess I'm having very honestly a little problem here with regard to the evidence toward the union. These perception cases are difficult anyway. I understand that we're dealing with very circumstantial evidence, but I am concerned about that with respect to the evidence directed toward the union.

(Transcript Volume 5, p. 23)

Later in this discussion, the trial court noted that, "This is a very close case ... I've struggled with this case from the outset." (Transcript Volume 5, p. 26) In ultimately announcing his decision to deny these motions, the court noted that, "it is without prejudice and we'll revisit it again." (Transcript Volume 5, p. 26) In discussing the resubmitted Rule 50 motions at the close of all of the evidence, the trial court observed that "I think that the case with respect to the Union is much thinner, obviously, than the one against the company ..." (Transcript Volume 6, p. 184) Ultimately, the court concluded that there was

"barely" enough evidence to warrant submitting the case to the jury. (Transcript Volume 6, p. 185)

The jury returned verdicts against both Crane and District 9. Timely appeals were taken to the Eighth Circuit Court of Appeals. On October 6, 1997, the Court of Appeals reversed the judgment below, and remanded the case to the District Court with instructions to enter judgment in favor of Crane and District 9.

REASONS FOR DENYING THE WRIT

I. Petitioner Has Misstated The Questions Presented

Petitioner's questions presented misstate the evidence below and/or are irrelevant in regard to District 9.

District 9 submits that its formulation of the question presented, rather than Petitioner's Question 1, accurately reflects the facts of this case and the holding of the Court of Appeals.

> Petitioner frames Question 2 as follows:
>
> Whether a perceived disability claim under the Americans With Disability Act will require Plaintiffs to produce direct evidence of the Defendant's perception?

In fact, the court below concluded that there was no evidence (direct or otherwise) that defendants' decision-makers perceived the Plaintiff as disabled. The court did not hold that direct evidence was required.

In Question 3, Petitioner contends that this case presents the issue of "whether a perceived disability claim under the Americans With Disabilities Act requires a record of actual impairment." Nothing in the decision of the appellate court in any way requires such a record.

Petitioner poses Question 4 as follows:

> Whether Petitioner's Graves Disease, mistakenly believed to be HIV or AIDS, qualifies as a perceived disability under the Americans With Disabilities Act?

In fact, the appellate court held that defendants' decision-makers did not believe Plaintiff to have HIV or AIDS. Plaintiff was perceived neither as having an impairment nor as being substantially limited in a major life activity. Thus, Petitioner's Question 4 is completely irrelevant to this case.

Question 5, which concerns the use of statistical evidence to show disparate treatment, has no relevance regarding District 9, since, as discussed herein, there was absolutely no evidence of disparate treatment by District 9.

Petitioner posits Question 6 as follows:

> Whether direct evidence of perceived disability by a chief shop steward who participated in the grievance process is sufficient to impose liability against a Union under the Americans With Disabilities Act?

In truth, there was no "direct evidence of perceived disability" by District 9's shop steward, and this individual in any event was not a decision-maker regarding Petitioner.

II. The Decision Of The Appellate Court Was Based On The Specific Facts Involved, And Presents No Issue Of Broad Importance

As demonstrated by Petitioner's devotion of the bulk of his brief to a discussion of the evidence presented to the trial court, this case involves a fact-specific determination by the Eighth Circuit Court of Appeals which simply does not raise issues of broad national concern for which certiorari is appropriate. This Court has previously noted that, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). In National Labor Relations Board v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170, 176 n.8 (1981), this Court held that it had improvidently granted a cross-petition for certiorari because "we are presented primarily with a question of fact, which does not merit Court review." Likewise, in C.J.D. Rudolph v. United States, 370 U.S. 269, 270 (1962), the Court dismissed as improvidently granted a writ of certiorari where the case merely presented issues of fact "and their review would be of no importance save to the litigants themselves."

In the present case, the Eighth Circuit addressed whether there was sufficient evidence from which a jury

could have reasonably concluded that Crane and District 9 perceived Plaintiff as having an impairment, perceived him to be substantially limited in a major life activity, and took action against Plaintiff because of these perceptions. Such issues regarding the sufficiency of the evidence presented at trial do not raise matters of such importance as to justify granting certiorari.

III. The Decision Of The Appellate Court Is Not In Conflict With Decisions Of This Court

In an attempt to manufacture a non-existent conflict, petitioner claims that the decision of the Eighth Circuit in the instant case is in conflict with holdings of this Court regarding the role of the jury in weighing the evidence and making credibility determinations. (Petitioner's Brief at 2). In fact, the Eighth Circuit here expressly noted that, "'[w]e will not reverse a jury's verdict for insufficient evidence unless, after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict for the non-moving party.'" (Pet. Appdx. A-10) (citation omitted) This standard is clearly not inconsistent with prior rulings of this Court.

IV. The Decision Of The Appellate Court Does Not Involve A Conflict Between The Circuits

The decision below does not conflict with decisions of any other Court of Appeals. Indeed, the legal principles set forth in the decision below are in full accord with holdings from other jurisdictions. Thus, the Eighth Circuit in the case at bar held that Petitioner was required to show that each defendant regarded him as disabled, i.e., having an impairment which substantially limited a major life activity. (Pet. Appdx. A-10) This is consistent with holdings of other circuits. See., e.g., Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996); Hedberg v. Indiana Bell Telephone Co., 47 F.3d. 928, 932 (7th Cir. 1995). The Eighth Circuit in the instant case also held that the relevant perceptions are those of the defendants' decision-makers. (Pet. Appdx. A-16) Other appellate courts have likewise so held. See, e.g., Burns v. City of Columbus, 91 F.3d 836, 844 (6th Cir. 1996); Hamm v. Runyan, 51 F.3d 721, 724 (7th Cir. 1995).

Thus, the case at bar plainly involves no conflict between the Courts of Appeals.

V. The Decision Of The Appellate Court Was Not Erroneous

While it has long been recognized that this Court does not grant certiorari merely because the decision of the court below was erroneous, in the instant case the facts establish that the decision below was indeed correct.

Petitioner asserted, in regard to District 9, that District 9 discriminated against him because of a perception that Petitioner was disabled with AIDS/HIV or Graves Disease. The evidence presented at trial, however, established that Petitioner's grievance was handled by District 9 Business Representative Robert Soutier and that Soutier was the decision-maker for District 9 in this matter. (In an effort to evade the appellate court's holding that District 9 shop steward L.C. Monehan was not a decision-maker, Petitioner contends that, "Monehan played a significant role in the decision to waive Petitioner's first and second step grievance rights." (Petitioner's Brief at 27) In fact, the evidence was uncontradicted that the practice between District 9 and Crane in discharge cases was to always waive the first two steps of the grievance procedure in order to expedite the matter.) Mr. Soutier had never met the Petitioner prior to the day of his grievance hearing, a time in which Petitioner's physical appearance was

unremarkable. No one in any way indicated to Soutier that Petitioner suffered from Graves disease, HIV/AIDS, or any other impairment or was in any way limited in any life activities. In this regard, Petitioner testified as follows:

Q. I believe you stated, sir, in earlier testimony that you were diagnosed in mid-1992 as having Graves'; is that correct?

A. Yes.

Q. Did you ever tell that to Mr. Soutier?

A. No.

Q. Ever?

A. No.

Q. Okay. Do you know of anybody who did?

A. No.

. . . . .

Q. In any conversation that you ever had with Bob Soutier was there ever any discussion of any type, direct or indirect, about Graves' disease?

A. No.

Q. In any discussion that you ever had with Bob Soutier was there ever any discussion about HIV status?

A. No.

Q. Directly or indirectly?

A. No.

Q. In any discussion that you ever had with Bob Soutier was there any mention, any reference to any possible disability of any type on your part?

A. No.

. . . . .

Q. [I]sn't it true that you know of no facts that anybody, anybody at any time anywhere has ever said anything to Bob Soutier about you having or possibly having Graves' disease?

A. No facts.

Q. Okay. Anytime, anywhere, anybody say anything to Bob Soutier about you having or possible having HIV, do you have any facts that would indicate?

A. No facts.

Q. And you similarly have no facts that anybody ever talked to Bob Soutier about you having or possible having AIDS?

A. No facts.

Q. And you have no facts whatsoever that anybody has ever had a conversation with

Bob Soutier at anytime, anywhere about your having or possibly having any disability whatsoever?

A. No facts.

(Transcript Volume 5, pp. 133, 142, 144-145)

Petitioner contends that District 9 shop steward L.C. Monehan (who, as noted above, was not a decision-maker) perceived Petitioner as having AIDS. In this regard, Petitioner falsely states that, "On page 13 the Court [of Appeals] acknowledges that Mr. Monehan described Petitioner as having HIV." (Petitioner's Brief at 29, emphasis added). Monehan's "description" arose in the following cryptic exchange during trial:

Q. Sir, do you recall when I asked you what you recalled his physical description to be in your deposition?

A. Yes.

Q. Do you recall what your answer was?

A. I think I told you that what I had seen on a person that would been ill in the effect of HIV virus that it was someone real skinny and dried up like you see on TV.

(Transcript Volume 3, p. 87)

Contrary to Petitioner's bald claim that the Eighth Circuit "acknowledge[d] that Mr. Monehan described petitioner as having HIV," in fact the court held that: "Even construing this less-than-clear statement as indicating that Monehan thought that Roberts physically resembled someone with HIV, his belief that Roberts exhibited symptoms which might be associated with HIV does not necessarily show that he believed Roberts had HIV." (Pet. Appdx. A-17) Indeed, Monehan's testimony at trial that he did not believe that Petitioner had AIDS/HIV was uncontradicted.

Petitioner argues that the jury could have found that Crane and District 9 discriminated against him because of a perception that he was disabled due to Graves Disease rather than AIDS/HIV. (Petitioner's Brief at 13) However, as noted above, there was no evidence that District 9's decision-maker Robert Soutier knew or believed that Petitioner had Graves Disease, or that he was substantially limited in a major life activity. Nor was there any evidence that Monehan (who in any event was not a decision-maker) either perceived Petitioner as having Graves Disease or perceived him as being substantially limited in a major life activity. (The parties stipulated at trial that Petitioner's

Graves disease did not limit any of Petitioner's major life activities.)

Not only did Petitioner fail to introduce any evidence that District 9's decision-maker either perceived him as having an impairment or perceived him to be substantially limited in a major life activity, Petitioner adduced not a scintilla of evidence to indicate any discriminatory intent by District 9. In this regard, there was no evidence of any disparate treatment by District 9. While Petitioner devotes a section of his brief to "The Statistical Evidence of Respondents [sic] Disciplinary Practices," the "evidence" referred to therein pertained solely to Crane, not to District 9. Thus, while Petitioner refers to other employees who committed acts of insubordination yet were not disciplined, there was no evidence that District 9 grieved or arbitrated the discipline of these employees. Nor was there any evidence that District 9 business representative Robert Soutier was involved in any of these incidents. Finally, there was no evidence that these other employees were "outside the protected class," i.e., that they were neither disabled nor perceived to be disabled.

The above facts plainly establish that the court of Appeals correctly concluded that the evidence was insufficient to support the jury's verdict.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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